146 U.S.

RECORD, CASE No. 13,574.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No. ~~373~~ 49

JENNIE M. THOMPSON AND JOHN C. THOMPSON, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF JOHN B. THOMPSON, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE SAINT NICHOLAS NATIONAL BANK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED JUNE 14, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 11, 1892.

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1 Court of Appeals.

JENNIE M. THOMPSON and Another, as Executors, &c., Appellants,
against
THE SAINT NICHOLAS NATIONAL BANK, Respondent.

Case and exceptions on appeal from judgment of general term, supreme court, first department.

Lewis Sanders, attorney for appellants; Taylor & Ferris, attorneys for respondent.

2 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capital, in the city of Albany, on the 16th day of April, in the year of our Lord one thousand eight hundred and eighty-nine, before the judges of said court.

Witness the Hon. William C. Ruger, chief judge, presiding. Gorham Parks, clerk.

Remittitur April 20th, 1889.

3 JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of John B. Thompson, Deceased, App'l'nts,
against
THE SAINT NICHOLAS NATIONAL BANK, Resp'd't.

Be it remembered that on the third day of May, in the year of our Lord one thousand eight hundred and eighty-eight, Jennie M. Thompson and John C. Thompson, as executors, &c., the appellants in this action, came here into the court of appeals, by Lewis Sanders, Esq., their attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York; and The Saint Nicholas National Bank, the respondent in said action, afterwards appeared in said court of appeals, by Messrs. Taylor &
4 Ferris, its attorneys; which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon that said court of appeals, having heard this cause argued by Mr. Lewis Sanders, of counsel for the appellants, and by Mr. William Allen Butler, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the said supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondent recover against the appellants costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

5 Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the said supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be inforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *April 20th*, 1889.

6 I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of [SEAL.] appeals, with the papers originally filed therein attached thereto.

GORHAM PARKS, *Clerk.*

7 [Endorsed:] N. Y. supreme court, general term. Jennie M. Thompson & another, as executors, &c., ag'st The Saint Nicholas National Bank.

8 Supreme Court.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of the Last Will and Testament of John B. Thompson, Deceased, Plaintiffs,

against

THE SAINT NICHOLAS NATIONAL BANK.

Statement.

This action was begun 18th of April, 1880; issue was joined by the service of an answer on the 12th of August, 1881.

John B. Thompson was the original plaintiff and The Saint Nicholas National Bank, a national bank doing business in the city of New York, the original defendant.

This cause came on for trial before Mr. Justice Lawrence and a jury on the 3d of February, 1886, and on the 4th the complaint was dismissed.

Judgment was entered April 22d, 1886, in favor of de-
9 fendant and against the plaintiff in the sum of $2,202.20.

John B. Thompson died November 12th, 1886, and the plaintiffs were substituted in his stead by order entered November 24th, 1886. The judgment was reversed on appeal by the general term and a new trial ordered. The cause was retried before Mr. Justice Patterson and a jury on the eleventh and twelfth days of

October, 1887, and a verdict directed for the defendant; exceptions to be heard in the first instance at the general term.

(Summons omitted.)

Supreme Court, City and County of New York.

JOHN B. THOMPSON
against
THE ST. NICHOLAS NATIONAL BANK OF NEW YORK. } Amended Complaint.

The plaintiff, by his amended complaint, alleges upon information and belief:

I. That now and at the times hereinafter mentioned the said defendant is and was a corporation duly created and doing business in the city of New York.

II. That on or about the eighteenth day of April, 1874, the said plaintiff was the owner of the following-described property, namely: Seventy-three (73) mortgage bonds of the denomination of one thousand dollars ($1,000) each of the Jefferson, Madison and Indianapolis Railroad Company, with interest thereon, payable semi-annually, at seven per cent. per annum; also twenty (20) mortgage bonds of the denomination of one thousand dollars ($1,000) each of the Indianapolis, Bloomington and Western Railroad Company, with interest, payable semi-annually, at the rate of seven per cent. per annum; that said bonds were of great value, to wit, of the value of one hundred and fifty thousand dollars ($150,000), and that on or about the said last-mentioned date the said defendant became wrongfully and illegally possessed of the said bonds.

III. That subsequently and prior to the commencement of this action the said plaintiff demanded of said defendant the possession of said bonds, and that they be severally returned to him, but the said defendant refused to deliver up the same or any portion thereof to this plaintiff.

Wherefore plaintiff demands judgment against said defendant for the return of said bonds, or, in case the same cannot be reached and returned to him by the process of this court, that he have judgment against said defendant for the sum of one hundred and fifty thousand dollars, besides his costs.

EDWARD H. HAWKE
Plaintiff's Attorney, 37 Wall Street, New York.

(Verification.)

11 N. Y. Supreme Court.

JOHN B. THOMPSON
against
THE SAINT NICHOLAS NATIONAL BANK OF NEW YORK.

The Answer of the Defendant to the Amended Complaint.

First. The defendant denies each and every allegation in the said amended complaint, except that it admits that it is and was a corporation as alleged, and that plaintiff did at some time demand some bonds from defendant, but whether they were the same as alleged in said amended complaint defendant is unable to state, and therefore controverts the averments in respect thereto.

Second. And, for a further and separate defence to this action, defendant alleges that at the time named in said amended complaint and for a long time prior thereto Capron & Merriam, bankers and brokers, doing business as such in the city of New York, were customers of and regular depositors with defendant and kept a large account in defendant's bank; that, as defendant is now informed and believes, it was the custom of said Capron & Merriam, as such bankers and brokers, to procure call loans, advances, and discounts from defendant for the benefit of themselves, and also of their customers, and, in accordance with such custom and in conformity with a regular business custom in said city between such bankers and brokers and the banks with which they dealt, the said Capron &

12 Merriam, in procuring such loans, advances, and discounts, pledged to defendant, as collateral security for the same, various securities, consisting of bonds, stocks, and commercial paper, coupled with an agreement on their part that in case they, the said Capron & Merriam, should become or be at any time indebted to said bank for money lent or paid to them or for their account or use in any sum or amount, that then the said bank might, in its discretion, sell at the brokers' board or at public auction or private sale, without advertising the same and without notice to them, all, any, and every collateral securities, things in action, and property held by said bank for securing the payment of such debt and apply the proceeds to the payment of such indebtedness, the interest thereon, and the expenses of such sale, as by such agreement, ready to be produced as the court may direct, will, amongst other things, more fully appear; that the bonds specified in said amended complaint were a part of the securities so pledged by Capron & Merriam to this defendant on account of such call loans, advances, and discounts made by defendant to and for said Capron & Merriam for and on account and with the knowledge and assent of plaintiff, but that defendant did not, at the time of such transactions, have any knowledge in respect to any person interested in such loans or in said securities except said Capron & Merriam; that said Capron & Merriam having failed to pay such loans on proper demand, defendant proceeded to sell and dispose of said securities pursuant to said agreement, and gave said Capron & Merriam credit for the net proceeds thereof, and there still remains

due after such credits to defendant from said Capron & Merriam a large balance on account of such loans and advances.

And defendant alleges that said Capron & Merriam are necessary parties to this action and to the complete determination of the matters involved therein.

RIGGS *A* DENMAN,
Defendant's Attorneys.

(Verification.)

13 At a circuit of the supreme court held in and for the city and county of New York, at the county court-house, in said city, on the thirteenth day of October, 1887.

Present: Hon. Edward Patterson, justice.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of John B. Thompson, Deceased, Plaintiffs,
against
THE SAINT NICHOLAS NATIONAL BANK, Defendant.

This action having been tried before Mr. Justice Patterson and a jury, the plaintiffs having taken various exceptions to the rulings of the court at the trial, and the jury having, under the direction of the court, found a verdict for the defendant, now, on motion of Mr. Sanders, of counsel for the plaintiffs, and after hearing Mr. Butler, of counsel for the defendant, in opposition, it is—

Ordered that the plaintiffs' exceptions taken at the trial of this action be heard in the first instance at the general term of this court upon a case to be made by the plaintiffs containing such exceptions, and that judgment be in the meanwhile suspended at the general term.

14 N. Y. Supreme Court Circuit.

JOHN B. THOMPSON
vs.
THE ST. NICHOLAS NATIONAL BANK. } Before Patterson, J., and a Jury.

OCTOBER 11TH, 1887.

Appearances: Lewis Sanders, for plaintiff; Taylor & Ferris, for defendants; Willian Allen Butler, of counsel.

Mr. Sanders opened case for plaintiff.

The COURT: You have stated to the jury certain circumstances referring to the transactions between Capron & Merriam and the bank at this time. Do you contend that the original possession by the bank was unlawful?

PLAINTIFFS' COUNSEL: Yes, sir.

Plaintiffs' counsel states that it is an action of replevin in the detinet.

To maintain the issues on the part of the plaintiffs their counsel read the evidence of JOHN B. THOMPSON, given on the former trial,

who, being sworn, said: I am the plaintiff in this action; reside at 9 East 38th street, city of New York; know a firm called Capron & Merriam; their place of business was the corner of Wall and New streets; the bank was located on the opposite corner; I was in possession on the 17th and 18th of April, 1874, of seventy-three Jefferson, Madison and Indianapolis second-mortgage bonds, value $1,000 each, seven per cent., payable semi-annually; twenty Indianapolis, Bloomington and Western Extension bonds, first mortgage, $1,000, payable, seven per cent. in gold, semi-annually; coupon bonds payable to bearer; ninety-three bonds in all; the interest was
15 paid regularly when I had them and is yet; on the 17th of April, 1874, I left seventy-three Jefferson, Madison and Indianapolis second-mortgage bonds with Capron & Merriam; they were left with them to be held as margins; I saw Mr. Capron and spoke with him about the bonds; they asked me for margins, and I gave them those seventy-three bonds as margins for stocks; they demanded those bonds or demanded, rather, margins, and I gave them those seventy-three bonds as margins; I took their receipt for them; the receipt was given to me immediately; I stated the bonds were to be held as collaterals or as margins for stocks purchased for my individual account and took a receipt to that effect; the next day, the 18th, they demanded more margins, and I gave them on that date twenty-five Indianapolis, Bloomington and Western bonds, of which twenty are a part of this suit, and took a receipt in the same manner; these are the two receipts that were delivered to me on the 17th and 18th of April, 1874, signed by Capron & Merriam; these receipts were signed Capron & Merriam, per William F. Patterson, one of their clerks—in fact, both of them are signed in that way, and that not being satisfactory to me, I saw Mr. Capron, and the wording of the receipt was not satisfactory and he inserted the words "his individual" in both receipts, and signed them himself, Capron & Merriam; this was done at my request; that accounts for the word individual being there.

The papers marked A and B were then read in evidence.

"EXHIBIT A."

"NEW YORK, *Ap'l 17th*, 1874.

"Received from J. B. Thompson, Esq., seventy-four thousand dollars, Jeffersonville, Madison and Ind. 2d-mtg. bonds, Nos.
16 as follows: 536 to 539, 552 to 621, $1,000 each, to be held as margin on his individual stock transactions."

CAPRON & MERRIAM,
Per W. F. PATTERSON.

$74,000.
Jeff., M. and I. 2ds.

CAPRON & MERRIAM.

"EXHIBIT B."

"NEW YORK, *Ap'l 18th*, 1874.

"Received from J. B. Thompson, Esq., twenty-five thousand dollars Ind., Bloomington & Western 1st-mtg. bonds, Nos. as follows: 4576 to 4600, $1,000 each, to be held as margin on his individual stock transactions.

CAPRON & MERRIAM,
Per W. F. PATTERSON.

"$25,000.
"Ind., B. & W. 1sts.

CAPRON & MERRIAM."

I gave no order on the 17th or 18th of April to Capron & Merriam to purchase stock for me in those several transactions. I had no individual stock transactions with them or either of those defendants on either of those days. The 19th of April, 1874, was Sunday. On Monday, the 20th, Capron & Merriam failed, immediately after the opening of the board. I made a demand on Capron & Merriam for those bonds three or four days after their failure. I saw Mr. Capron; he did not give me the bonds; he informed me they were in the St. Nicholas National bank.

17 Q. You demanded, you say, these bonds from Mr. Capron?
A. I did.

Q. You say you learned from Mr. Capron that the bonds were left in the bank; what did you do then?

A. I went in person to the bank about these securities.

Q. (Handing paper.) I produce the notice and ask you if that is your signature?

A. That is my signature.

The paper was then marked C for identification.

I gave that notice to Mr. William Tharp.

The further examination of this witness was suspended for the present.

WILLIAM THARP sworn for plaintiff:

I reside on State street, city of Brooklyn; am a lawyer by profession and notary public also. I know Mr. John B. Thompson; knew the officers in the St. Nicholas National bank in the year 1874; the president of the bank was J. Lee Smith; he is in court. I received a paper from Mr. Thompson, to be served on him or one of the bank officers.

Q. (Handing Exhibit C for identification.) Look at the paper which I now show you and state if that is the paper Mr. Thompson gave you.

A. Yes, sir; it was a paper like that, signed by Mr. Thompson; they were duplicate originals. I had a paper corresponding to that,

to serve on the president or any of the officers of the bank. I served it on Mr. Smith, the president, about the day of the date of it.

Plaintiff's counsel then offered the paper in evidence.

Mr. PARSONS: I would like to cross-examine him a little about it first.

18 Cross-examined by Mr. PARSONS:

Q. (Handing Exhibit C for identification.) Is this your handwriting on the back of this paper?

A. Yes. The memorandum on the back was made, I guess, about the time I served it.

Q. Might it not be that this notice was served about the time the sale was made, in 1879?

A. No; I served another notice on him. I served two notices altogether. About the time the sale was to be made I served a notice.

Plaintiff's counsel then offered in evidence Exhibit C for identification. It was marked Exhibit C and read as follows:

No. 7 WALL STREET, NEW YORK, *May* 5, 1874.

To the St. Nicholas National Bank of New York:

Take notice that the twenty $1,000 1st-mortgage bonds of the Indianapolis, Bloomington & Western Railway Co. (extension), numbered 4577 to 4586 and 4566 to 4575, inclusive, and the 73 $1,000 2d-mortgage bonds of the Jefferson, Madison & Indianapolis Railroad Co., numbered 536 to 539 and 552 to 621, inclusive, pledged to you by Messrs. Capron & Merriam, are and each of them is my property, and you are hereby notified not to part with the said bonds or with any or either of them, except by my order; and I further demand from you an account showing what lien you have or claim to have on the said bonds.

Respectfully yours, JOHN B. THOMPSON.

EDWARD H. HAWKE,
Attorney for John B. Thompson.

Q. Did Mr. Smith render you any statement or any papers to give to Mr. Thompson after you delivered this notice?

A. No, sir.

19 JOHN B. THOMPSON recalled:

After this notice, Exhibit C, was made I received no statement whatever from the bank of any loans or claim which they held upon your bonds. The first notice I received from the bank in respect to these bonds was on the 20th of May, 1879 (handing paper). The paper which is now shown me is the paper that was served on me. The signature to that paper is that of A. Parkhurst, defendant's then cashier.

The paper was then read in evidence and marked Plaintiffs' Exhibit D, and is as follows:

NEW YORK, *May 20th*, 1879.

Mess. Capron & Merriam.

GENTLEMEN: Your indebtedness to "The Saint Nicholas National Bank of New York" under your agreement with said bank dated December 2d, 1873, remaining unpaid, we think it not out of place, though not called for by the agreement, to give you notice that unless the amount due the bank is paid before the 28th day of May instant the collaterals which we hold as security therefor will be sold at public auction on said 28th day of May, at 12½ o'clock p. m., at the Exchange sales-room, No. 111 Broadway, in this city, by A. H. Muller, auctioneer, pursuant to said agreement.

Respectfully, A. PARKHURST, *Ca.*

To Capron & Merriam, John B. Thompson, Esq., New York.

I took that notice at once to the cashier and demanded my bonds. Specifically I demanded seventy-three Jefferson bonds and twenty Indianapolis bonds. I showed him the notice the same day—
20 the 20th of May. The sale was the 28th. I told him I had notice that these bonds were to be offered for sale on the 28th by A. H. Muller. I demanded those bonds or show me what claim the bank held against them or on them. He did not deliver them to me. I demanded them from him. The value of those Jefferson bonds were $1,000, par value. They were sold at auction at that time for 103½—the 28th of May, 1879. The bonds sold were the Jefferson ones—a portion that were left—seventy-three.

By the COURT:

Q. Sold the others?

A. I don't know, sir, the facts about the others.

Cross-examined by Mr. PARSONS:

Q. What were they worth in 1874?

A. They were worth par, seven per cent. bonds, regular interest paid; never defaulted.

Q. Did you deal in them in 1874, about the time of the failure of Capron & Merriam?

A. I had them on hand; did not buy or sell them. They were not offered on this market at that time. I did not say I knew what they were sold for. You asked me what their value was, and I said par.

Redirect:

The interest was paid regularly on those bonds up to to-day, seven per cent.

I had several interviews with the cashier, Mr. Parkhurst, as to this matter between me, Capron & Merriam, and the bank.

Cross-examined by Mr. BUTLER:

Q. You stated that these Jefferson, Madison and Indianapolis second-mortgage bonds were not listed on the stock exchange in April, 1874. Were they dealt in, to your knowledge, in this
21 city or mostly in Louisville?

A. I presume they were mostly in Louisville. They were hardly known in this market; very little at that time.

Q. Will you please state how it accords with your recollection that between the 2d and 30th of May, 1874, the market value of those bonds, as dealt in in Louisville, was between '74 and '76?

A. The value in Louisville?

Q. Yes.

A. I cannot answer.

Q. You do not know about it?

A. No, sir.

Q. You know the fact that the other road, the Bloomington and Western Extension, went into the hands of a receiver?

A. They did.

Q. And the bonds were placed in trust in a trust company and trust receipts issued?

A. No, sir.

Q. You do not recollect about that?

A. They were a long time after.

Q. Do you remember when they went into the hands of a receiver?

A. I think in 1875.

Q. In 1875?

A. I think so; about that.

Q. I would like to get your best recollection about any market value of those Jefferson bonds along in the spring of 1874?

A. There was no market value here. They were a regular paying interest; seven per cent.

Q. I ask what was the market value in Louisville?

A. I do not know anything about that.

Q. What was the highest sale you knew of there?

A. I had not heard of any.

Redirect:

Q. Do you know what they are valued at in the market to-day, the Jeffersons?

A. About 120.

Defendant's counsel admits that on the 5th of May, 1874, Mr. Thompson caused to be served on the bank the notice, Exhibit C.

CHARLES T. JUNG, called for plaintiff, being duly sworn, was examined by Mr. SANDERS, and testified as follows:

22 In April, 1874, I was accountant for Capron & Merriam; kept their books since the firm started, in the spring of 1873.

Q. I show you a book (handing witness book). What book is that?

A. That is the ledger of Capron & Merriam.

Q. Will you turn to the individual account of J. B. Thompson, pages 126 and 127, and state whether on the 21st of April that account was closed?

Defendant's counsel objects to this question and to any evidence as to the state of the account between Thompson and Capron & Merrian on the following grounds:

First. That by Mr. Thompson's own evidence it appears that he delivered the bonds claimed in this action to Capron & Merriam on their several demands for margin and more margin for stocks purchased for his account, and it is incompetent for the present plaintiff to raise the question upon this trial, in the face of this evidence, whether Capron & Merriam were entitled to make the demand for margin.

Second. That in this action, the sole issue being the right of the possession of the property, it is wholly immaterial and irrelevant what the state of the account was as between Capron & Merriam and Thompson so long as Thompson afterward put them in possession of the bonds in suit, which he himself testified were coupon bonds payable to bearer—so long as they delivered them to the defendant.

Third. That Capron & Merriam, not being parties to this action, would not be concluded by any verdict herein as respects any right of theirs against the defendant, and that no accounting can be taken in this action in any event without their being parties.

23 DEFENDANT'S COUNSEL: I stated that I shall not ask to dismiss this complaint for want of a tender made from Thompson to Capron & Merriam.

Mr. SANDERS: Then I do not withdraw the question, but press it.

The COURT: I shall hold in this case that the distinctive accounts between Thompson and Capron & Merriam cannot be gone into here; that this question, framed as it is, does not depend upon the state of accounts between Thompson and Capron & Merriam, and that therefore that evidence is immaterial on the issue here.

Objection to the question sustained, and plaintiff excepts.

CHARLES T. WING, sworn for plaintiff, on cross-examination testified:

I knew all about the Indianapolis, Bloomington and Western first-mortgage bonds at the time, but I could not give you any idea of values without consulting books; could not from recollection, because the price varied so much. I think at one time they were worth par, and I think I have bought them as low as ten cents on the dollar. I think the lowest price was obtained after 1873—after the panic of 1873. It is a fact in my knowledge that the value of all railway securities, irrespective of their intrinsic merits, was affected unfavorably by the panic of 1873 and 1874. This unfavorable influence continued, more or less, until 1879, except in individual cases where unusual prosperity advanced the price. It is a fact that during the period of 1874, the spring of 1874 and 1879,

many of these railway companies had to go through what we call reorganization, and this road amongst them. It was a period during which it was necessary for parties holding securities of this description, and able to hold them, to, as we say, nurse them along.

Plaintiff put in evidence order and consent reviving suit.

24 At a special term of the supreme court of the city and county of New York, held at the county court-house, in said city, on the 24th day of November, 1886.

Present: Hon. Charles H. Van Brunt, justice.

JOHN B. THOMPSON, Appellant,
against
THE ST. NICHOLAS NATIONAL BANK, Respondent.

On reading and filing the consent below and on motion of Lewis Sanders, counsel for the executors—

Ordered that Jennie M. Thompson and John C. Thompson, as executors of the last will and testament of John B. Thompson, deceased, be, and they are hereby, substituted in his stead as appellant herein.

We hereby consent to the entry of the above order.
New York, Nov. 23, 1886.

TAYLOR & FARRIS,
Defendant's Attorneys.

Plaintiff rests.

Mr. Taylor opens case for the defendant.

Defendant's counsel reads in evidence stipulation marked
25 Exhibit No. 1, which was made during a pending motion made on the day of its date, October 10th, 1887, to postpone the trial on the ground of the illness of the president of the defendant bank during the transactions in issue, and that on plaintiff's making such stipulation said motion was withdrawn and the trial proceeded with in its order on the calendar.

N. Y. Supreme Court.

JENNIE M. THOMPSON and Another
ag'st
THE ST. NICHOLAS NAT'L BANK.

The plaintiff stipulates to admit on the trial as follows:

1. That the bonds in suit demanded in the complaint came into the possession of the defendant bank prior to the making of the certifications on the 18th April, 1874, for the account of Capron & Merriam, which were made on that day.

2. That the certifications made by the bank were on the faith of the deposit of said bonds and of such other securities as were held by the bank for account of Capron & Merriam.

3. That the defendant bank used its best efforts to procure as large a price as possible for all the securities pledged to it by Capron & Merriam, including said bonds in suit. This not to be
26 a waiver of claim that national banks have no right to certify checks under circumstances of this case.

New York, Oct. 10, 1887.

LEWIS SANDERS,
Plaintiff's Attorney.
TAYLOR & FERRIS,
Defendant's Attorneys.

Defendant's counsel offers in evidence agreement, dated December 2, 1883, between the St. Nichola- bank and Capron & Merriam.

Objected to as incompetent and that no foundation has been laid for it or of any transaction between Capron & Merriam and the bank in reference to these bonds in suit.

The COURT: That is a question of the order of proof only, and if it is not connected I will strike it out.

DEFENDANT'S COUNSEL: I offer it subject to that.

Plaintiff's counsel excepts.

Agreement then read in evidence, marked Exhibit No. 2.

Agreement, Dated the 2d Day of December, 1873.

We hereby agree with the St. Nicholas National Bank of New York, in the city of New York, that in case we shall become or be at any time indebted to said bank for money lent or paid to us or for our account or use or for any overdraft in any sum or amount then due and payable, the said bank may, in its discretion, sell at the brokers' board or at public auction or private sale, without advertising the same and without notice to us, all, any, and every collateral securities, things in action, and property held by said bank for securing the payment of such debt and apply the proceeds to the payment of such indebtedness, the interest thereon, and the expenses of the sale, holding ourselves responsible and liable
27 for the payment of any deficiency that shall remain unpaid after such application.

CAPRON & MERRIAM.

STEPHEN K. LUDLOW, being duly sworn, was examined by Mr. BUTLER, and testified as follows:

I am the book-keeper in the St. Nicholas bank; have been in the employ of the bank 21 years; was book-keeper on the 18th of April, 1874, and for a number of years before; was familiar with the accounts kept between the bank and its depositors and dealers as far as my ledger is concerned; remember the fact of Capron & Merriam being depositors in and dealers with the bank.

Q. What is the book now produced (handing witness book)?

A. Ledger A to L.

Q. Can you, by looking at that book, refresh your recollection and state during what period the account of Capron & Merriam with the bank continued?

A. Yes, sir (looking at book); it was opened November 17th, 1873; the date of the last transaction was April 20th, 1874.

By Mr. SANDERS:

Q. What is that ledger made from—the entries in it—what do you take them from?

A. I take them from several books—deposit book, discount book, journal, debtors' book.

Q. Paying teller's book?

A. Both paying and receiving tellers.

Q. None of those books were kept by you?

A. No, sir.

Q. And all you know about the entries in that account is what you copied from their books?

A. Yes, sir.

Q. And you have no personal knowledge of the accuracy of these transactions other than that you have made a correct copy
28 from these other entries, as you believe?

A. Yes, sir; I made from day to day the entries, debit and credit, in that account. I took the items constituting those entries from the several books of account in the bank which related to the transactions referred to in the account. They were the deposit book, certificate book, journal, discount book, and deposit book. The entries in the ledger at that time I posted correctly from those books. Of these books some of them are here. All the bank has in its possession are here in court.

Q. What search did you make? What became of the books of the bank that were in use in 1874?

A. I suppose some are destroyed. We had a change in the bank. I cannot say. They moved. There was an accident in the building of the bank which led to the destruction of a great many of their books and papers several years back. I am not aware of the existence of any book in the bank except those that are here produced in court. They are two deposit books and general debit book.

WILLIAM J. GARDINER, being duly sworn for defendant, testified as follows:

I am the cashier of the St. Nicholas bank. In 1874 I was assistant receiving teller; had been in the employ of the bank then 10 years; altogether 24 years; knew Capron & Merriam. In April, 1874, they were stock brokers; office on the corner of Wall and New. They opened an account with our bank in 1873; it was before the date of this agreement, Exhibit I. Their dealings with the bank were continuous from that time down to the 20th of April. Their account was a very extensive one—considerable amounts; their daily drawings and deposits quite large; hundreds of thousands of dollars*a;* an active stock broker's account.

Q. State to the jury what the course of dealing was between
29 Capron & Merriam as to their keeping the bank supplied with securities under that agreement.

Objected to as irrelevant and immaterial, and that there is but one transaction to investigate. Objection overruled, and plaintiff excepts.

A. It was customary for them to deposit securities with us to protect us against any possible overdraft at the close of the business.

Q. When those securities came in the bank how were they dealt with with reference to the amounts to be certified against them? Who had possession of them so as to certify against them under the agreement?

Same objection, same ruling, and same exception.

A. They were deposited with the cashier and by him handed to the paying teller, stipulating the amount to be certified upon them. The teller took the directions from the cashier. The cashier would hand them to the teller. Then he instructed the teller how much to certify against the securities. In April, 1887, Elias R. Vanderveer had charge as paying teller, whose duty it was to make certifications. It was customary for the cashier to call me and hand me securities to give to Mr. Vanderveer, with instructions how much to certify on. I was only assistant teller at the time, and I acted for both tellers.

Q. In what book of original entry were the certifications made?

A. The certification book.

Q. What has become of that book which was in use in April, 1874?

A. It is destroyed. I presume it has gone. I know it has been searched for very diligently.

Q. Have you made search for it?

A. I have.

Q. To what extent?

A. A few hours; I suppose a few days.

30 Q. What, if anything, happened in the bank which leads you to suppose it was destroyed?

A. What is that?

Q. Something has been referred to by way of accident to the bank.

A. The bank building was sold in 1883, and in process of alteration our books were put on the third floor, and the workmen got in there one day and commenced tearing down the walls, and the result was that they toppled one pile of books over on the other and they became so defaced that the writing in them could not be deciphered; so a large quantity of them were destroyed—sold as waste paper.

Q. Can you state, independent of the book, the amount of certifications of checks for Capron & Merriam made on the 18th of April, 1874?

A. I cannot from recollection; no, sir.

Q. Will you look at the ledger here and see if you can refresh your recollection?

By Mr. SANDERS:

Q. Did you make any of the certifications yourself on the 18th of April?

A. I did not.

Q. Did you make any of the entries of the certifications of the checks for Capron & Merriam on the 18th of April, 1874?

A. Not that I know of.

Q. You did not certify any of the checks?

A. I did not.

Q. Did you see any of the entries for such certifications in the original books of the bank?

A. Yes, sir.

Q. Have you any distinct recollection as to any of those?

A. I know there were a number of them; I could not say the amounts at all.

Q. But you do not know of your own knowledge whether the entries of certifications are correct, except you believe them to be so because Vanderveer made them?

A. I do not know of my own knowledge; no.

Plaintiff's counsel objects to the evidence.

31 The COURT: He may testify from that book the amount of certifications made at that time.

Objection overruled, and plaintiff excepts.

A. $236,802.70 on the 18th of April. That includes the whole amount of certifications on that day; not other debts. The amount of checks paid through the clearing-house on that day was $17,529.67; cash paid over the counter, $200; checks paid that morning through the clearing-house.

Q. State how the account stood on the morning of the 18th in respect to any overdraft on the 17th.

Objected to as incompetent, irrelevant, and hearsay. Objection overruled, and plaintiff excepts.

A. Debit balance, $28,657.31; the deposits on the 18th of April were $211,263.51.

Q. Now, will you please deduct from that the $28,657.31, add up the items you have given of certifications, clearing-house checks, and cash?

A. $254,532.37.

Q. Now, will you please deduct from the amount of deposits on the 18th the overdraft of the 17th and give us the amount?

A. $182,606.20; that is the amount of deposits on the 18th, less the overdraft on the 17th. After the 18th checks to the amount of $210 were paid in cash on the morning of the 20th over the counter. I learned of the failure of Capron & Merriam some time dur-

ing the 20th. This check of $210 paid must have been paid after 10, before we heard of the failure.

Q. Add that to the $254,532.51—what is the amount?

A. $254,742.37.

Q. Now, will you deduct from that sum the $182,606.20?

A. $72,136.17; that sum represents the overdraft, including the $210.

Q. Leave that $210 out and give us the amount of the overdraft as it stood at the close of business on the 18th of April, 1874?

A. 71,920.17.

Q. Has that debt to your bank ever been paid?

Objected to unless it is confined to his knowledge.

32 By the COURT:

Q. Do you know whether it has or not?

A. I know it has not.

Plaintiff's counsel moves to strike out the answer. Motion denied, and plaintiff excepts.

By Mr. BUTLER:

Q. State whether or not that debt to your bank by Capron & Merriam of $71,000 odd has ever been paid.

Plaintiff's counsel objects to any testimony except it is within the witness's own knowledge. Objection overruled, and plaintiff excepts.

A. It has not.

Q. What, if any, balance is there unpaid or deficiency remains due?

Objected to as hearsay and incompetent and as calling for a conclusion. Objection overruled, and plaintiff excepts.

A. I could not state in exact figures. I think it is about $1,800. The rest of the debt has been paid by selling from time to time securities held as collateral. The bank held on the 18th of April, 1874, besides the 93 bonds in suit, $23,000 Missouri, Iowa and Nebraska first-mortgage bonds, $6,000 Peoria and Springfield, $3,000 New York, Montreal and Boston second-mortgage bonds, 1,534 shares of Hampshire and Baltimore coal stock, 50 or 100 shares of Baltimore Allen Company's stock and Pelham manor and Hughenots heights. These were all the securities we held against the certifications except the bonds in suit. I know of the disposition of those other securities.

By Mr. SANDERS:

Q. Did you personally sell any of the securities?

A. I could not sell them. They were sold at auction.

33 By Mr. BUTLER:

Q. I will confine you to the securities other than the 93 bonds in suit. What became of those?

A. They were sold at auction by Messrs. A. H. Muller & Son, of No. 7 Pine street, in this city. They are auctioneers. They sell miscellaneous securities, stocks, bonds, and things of that nature. They were considered the leading auctioneers for that purpose. They were sold May 28th, 1879.

Q. Now, state, if you please, how much the bank realized from these securities, as well as the bonds in suit.

Plaintiff's counsel objects that a sale of the securities five years after they were pledged to the bank is not evidence of the value of the securities and is not binding on the plaintiff. Objection overruled, and plaintiff excepts.

Q. I am speaking only of the securities that I read to you. Leave out the bonds in suit. Leave out the Jeffersonville, Madison and Indianapolis, and Indianapolis, Bloomington and Westerns.

A. $9,790.20. That is the total result of the sales at auction by Muller & Co. of the securities other than the bonds in suit.

Q. Of the bonds in suit—that is, the $73,000 Jeffersonville, Madison and Indianapolis and the $20,000 Indianapolis, Bloomington and Westerns—when were they disposed of and how by the bank?

A. I did not dispose of them myself.

By the COURT:

Q. Do you know?

A. I know part of them were sold at auction.

Q. Which part?

A. $25,000 Jeffersonville, Madison and Indianapolis second-mortgage bonds; at the same time the other securities were sold.

By Mr. SANDERS:

34 Q. Explain, in reference to the Indianapolis, Bloomington and Western bonds, what, if any, change had taken place during the holding by the bank.

A. It became necessary for us to surrender those. I surrende-d them in connection with others to the Union Trust Company and accepted their receipt for them. On a reorganization *and* I received the certificate of the trust company in lieu of the bonds. I could not tell you the exact date; before the commencement of this suit, in April, 1881. The certificate that I took stood in lieu of the bonds; that certificate sold at the same time with the other securities.

Q. What did that realize?

Objected to by plaintiff on the ground that it is not the measure of the value of the bonds at the time, and that the defendants, by converting the bonds, holding them, and then converting them into a receiver's certificate, are liable for the full face value of the bonds. Objection overruled, and plaintiff excepts.

A. $2,650. The certificate represented twenty bonds—that is, all the bonds of that issue. Some of these Jeffersonville, Madison and Indianapolis bonds were sold at private sale; that applied to all ex-

cept those that were sold at auction. The cashier had charge of selling those bonds, or in his absence the president. All those sales and deposits that I speak of were made prior to the commencement of this action.

Q. State, as far as you know, whether any tender of any amount or offer to pay any sum was ever made by Mr. Thompson to the bank.

Objected to. Objection overruled, and plaintiff excepts.

A. Not that I am aware of. I knew Mr. Thomson.

Q. Can you state when he died?

Plaintiff's counsel admits that it was the 12th of November, 1886. Up to that time he was not in business here in the city of New York that I was aware of; he was here in New York.

We never collected anything from Capron & Merriam on account of this debt beyond the proceeds of these securities; the bank gave credit to Capron & Merriam, not only for the proceeds of sale, but also for all the interest received on the bonds.

Defendant's counsel admits that the defendant was incorporated as a national bank under the national banking act.

Cross-examined by Mr. SANDERS:

Q. There remains 48 Jeffersonville, Madison and Indianapolis second-mortgage railway bonds not accounted for in your statement. Did you personally negotiate the sale of any of these bonds?

A. No; I did not; nor did I hear the negotiations or the conclusion of the negotiations between the parties by which any of these 48 bonds were sold. I have no personal knowledge of the price they realized. I have some — of when they were sold; they were sold before the 28th of May, 1879.

Q. If I understand you correctly the bank paid out by certifications through the clearing-house or on certified checks over the counter on the 18th of April $254,532.37?

A. Yes, sir.

Q. And that they paid out on overdrafts of the 17th $28,657.31. Is not that correct?

A. They did not pay it out at all; never received money to cover it.

Q. You had paid it out on the 17th?

A. It was the result of the business of the day—yes.

Q. And on the 18th you received moneys to cover the debit?

A. For deposit.

Q. What was the amount of that deposit?

A. $211,203.51.

Q. What was the total certifications for the account of Capron & Merriam by the bank on the 18th April, 1874, over and above
36 the actual amount of money on deposit with the bank to their credit at that time?

A. That I could not tell you without referring to the ledger.

Q. Please refer to the ledger.

A. You mean at the close of business that day?
Q. Yes.
A. $25,539.19.
Question repeated.
A. I did not understand that question that way; I understood you to ask me the amount of deposits on that day, $254,196.50. I have merely taken the amount of certifications on that day as against the amount of their credits.
Q. The balance of the $72,000 or the difference between that sum of $72,136.17 is what the bank overcertified on the 17th and what came through the clearing-house on the morning of the 18th?
A. Yes, sir.
Q. Let us get these figures right down one after the other. The banks certified checks of Capron & Merriam on the 18th of April to the amount of $236,802.07?
A. $236,802.70.
Q. And they paid checks received through the clearing-house $17,529.67?
A. That is right.
Q. And over the counter $200?
A. That is correct.
Q. Total, $254,532.37. There was a balance due on overcertification of checks certified by the bank for Capron & Merriam on the 17th of April of $28,657.31, was there not?
A. I don't know. There was an overdraft at the close of business. How it was occasioned I don't know.
Q. Well, it was for the certification of checks, was it not?
A. I don't know.
Q. There was an overdraft paid on the 17th by the bank?
A. Yes, sir.
Q. In addition to the amount which I have already given?
A. Yes; that is correct.
Q. And which they had to make good?
A. They had to make that good before anything could be done.
Q. For which Capron & Merriam were liable for $28,657.31 on the 17th of April?
A. Yes, sir; that is right.
37 Q. And on the 20th of April the bank paid over the counter $210?
A. Yes, sir.
Q. Being all that they paid for Capron & Merriam subsequent to the 18th of April?
A. Yes, sir.
Q. And the total balance claimed by the bank on this account is $72,136.17, is it not?
A. Yes, sir.
The COURT: As of what date?
Mr. SANDERS: As of the 20th of April, 1874.
The WITNESS: That is right.
Q. And that included the $210 paid on the 20th of April?
A. It did.

Q. And the balance, amounting to $71,926.17, was for checks of Capron & Merriam on the St. Nicholas bank, certified by that bank when Capron & Merriam had no money on deposit with the bank to meet them?

A. Not necessarily. That was a debit balance to that account. It may have been certifications or checks paid through the clearing-house. That was the result of the account.

Q. You paid no checks through the clearing-house on the 20th, did you?

A. No, sir.

Q. And you certified, as you say, $236,802.70 up on the 18th of April?

A. Yes, sir.

Q. And you had $211,263.51 deposited with your bank for Capron & Merriam on the 18th of April?

A. We did.

By the COURT:

Q. These certifications were certifications of checks, weren't they?

A. Yes, sir; they were certifications of checks of Capron & Merriam.

Q. What you call certifications were certifications of checks?

A. Yes, sir.

By Mr. SANDERS:

Q. And the $17,529.67 that you paid on the 20th of April came through the clearing-house in the morning, did it not?

A. It did.

Q. At ten o'clock?

A. Yes, sir.

38 Q. So that you had to apply to the certified checks a balance remaining after paying that $17,529.67 of $193,733.84, did you not?

A. I don't make it that.

Q. What do you make it?

A. We first had to wipe out an overdraft.

Q. Leave out the question of overdrafts.

A. What are your figures?

Q. $193,738.34.

A. I can't get at that from the figures that I have here withou my ledger.

Q. Take $17,529.67 from the amount of deposit, $211,263.51.

A. $193,733.84.

Q. Yes; and deducting the $200 that came in over the counter would leave $193,533.84?

A. That is right.

Q. Which the bank had applicable to the payment of the certified checks?

A. Yes, sir.

Q. And no more?

A. No; we had no more.

Q. So that for the difference between that $193,533.84 and the $236,802.70, certified on that day, Capron & Merriam had no money on deposit with the bank to their credit to meet those certifications, had they?

A. There was no money there.

Q. Had no money on deposit with the bank to their credit to meet those certifications?

A. No; there was no money there.

Q. Will you give the amount, please, of the difference.

A. $43,268.86.

Q. And if you add the overdrafts of the previous day and the $210 paid on the 20th of April you will have the total, $72,136.17, will you not?

A. That is right; yes, sir. This deposit was made by Capron & Merriam on the 18th of April, 1874. It was a deposit to their general credit, and so credited by the bank, $211,263.51, paid in by Capron & Merriam to their general account, and so credited by the bank. I think I saw these bonds in suit in April, 1874. I couldn't tell you the day. I have seen the bonds, presumably at that time. I can't place the date. I saw the bonds about that time, April, 1874.

Q. Before or after the certification?

39 Mr. BUTLER: I object to that. It is covered by the stipulation. It is wholly immaterial whether the witness saw them or not. The plaintiff has admitted in this case that the bonds were there before the certification. There is no doubt about the fact.

Objection sustained. Plaintiff's counsel excepts.

Q. You have been subpœnaed to produce an account of the income from these collaterals which were deposited by Capron & Merriam in bank, have you not?

A. Yes, sir.

Q. Can you state from memory or from any facts or figures in your hands or possession or the bank's possession what was the first receipt of dividends or coupons from securities held against Capron & Merriam's account, other than the 93 bonds in suit by the bank?

A. No; I cannot state it from recollection.

Q. Can you state it from any figures in the possession of the bank? Have you seen a paper which contains such statement?

A. I have.

Q. Which Mr. Butler holds in his hand?

A. He has a paper in his hand.

Q. Can you from that paper refresh your recollection or give me the information that I call for by my question?

A. I can give you the figures from that paper, but that paper is not in my handwriting.

Q. No; I don't say it is in your handwriting.

A. I can give you the figures from that paper.

The WITNESS: I don't know what the income has been.

Q. Don't you know that there has been income collected on these securities?

A. I know something has been collected, but the amount I don't know.

Q. Will the figures on the paper in Mr. Butler's possession give you the information necessary to testify on that subject?

A. No, sir; because they are not in my handwriting.

40 Q. They are the bank's accounts?

A. Yes, sir; I can tell from that paper what is on it. I cannot refresh my memory sufficiently to tell what the amount was.

Q. Did the bank collect any of the coupons of the Missouri and Nebraska bonds, $23,000; if so, what was the first collection?

A. I don't see any entry of it nor of the $6,000 Peru and Springfield bonds, nor of the $3,000 New York, Montreal and Boston bonds; Hampshire and Baltimore coal stock, there is a dividend on that January 2d, 1875, $460.20; the next one is March 30th, 1876, $368.16; the next, January 2d, 1877, $230.10; that is the last; nothing from Pelham Manor. The bank collected the coupons of the Jeffersonville, Madison and Indianapolis railway second-mortgage bonds. That is all the income they derived from all the securities other than the bonds in suit, up to the time of the sale.

Redirect examination by Mr. BUTLER:

Q. The paper that you hold in your hand and from which you have refreshed your recollection—what is that paper?

Objected to as immaterial and irrelevant. Objection overruled. Plaintiff's counsel excepts.

A. It is a paper showing the accounting between the bank and Capron & Merriam as regards their loan or the amount taken for the purpose of covering their overdraft on the 18th of April.

Q. State whether or not, looking at that paper, you can state from your recollection, as you have stated in regard to the securities other than those in suit, whether or not the amount collected and received by the bank for interest on the securities in suit are there set forth.

A. They are.

Q. And will you please state in what way the account is made up as between Capron & Merriam and the bank, as to charging and crediting interest?

Objected to on the ground that the account is not evidence for the bank.

41 The COURT: No; the account is not in evidence for the bank, but if the account is good to refresh his recollection for one thing it is good for another.

Objection overruled. Plaintiff's counsel excepts.

A. When we collected the coupons we would credit the account and hold them to the end of the six months—that is, until the 1st of July or the 1st of January. At that time we would credit the loan, or Capron & Merriam, as the holders of the loan, with the

amount collected—with the interest on that amount collected to the time—from the date of the collection to the end of the six months. They would have the benefit of the interest on the collection.

Q. And then how did you charge interest on the balance of the overdraft and loan?

A. We would charge them interest on the actual balance each six months.

Q. After giving credit that amount collected and the interest?

A. Yes, sir.

Q. State whether or not the balance which you state was still remaining due after crediting all collections was arrived at and in that way.

A. It was.

Q. After exhausting all the securities and giving all those credits in the way you have described, there was still a deficiency, as you testified yesterday?

A. Yes, sir.

Q. State whether or not, after crediting Capron & Merriam with all the collections from these securities and interest on those collections and all proceeds of sales, the deficiency that you stated yesterday in your redirect examination remained.

Mr. SANDERS: I object to that as calling for a conclusion and as not giving facts upon which the basis of computation is made.

The COURT: We have gone all over the figures; we have
42 had the accounting, and now he can testify as to whether or not that result arises after applying the money realized from these several sources.

By the COURT:

Q. Do you know those bonds were sold?

A. Part of them were—the Jeffersonville, Madison and Indianapolis second-mortgage bonds.

Q. Have you any knowledge of the price at which they were sold?

A. I have on this memorandum.

Q. Are you the cashier of the bank?

A. Yes, sir.

Q. Did you know of this thing in your ordinary duties as cashier, in the discharge of the business of the bank?

Objected to.

The COURT: I will allow him to prove general knowledge of this sale and what was realized from the bonds, if he has any way of doing it.

Mr. SANDERS: Mr. Gardner was not the cashier of the bank at that time.

The COURT: He was not?

The WITNESS: No, sir; I am the cashier now, but I was not then. Mr. Parkhurst was the cashier of the bank at that time.

The COURT: You want to know from this witness, Mr. Butler, if, by referring to that paper which he did refer to, he can state what

amount was certified to Capron & Merriam on the sale of these bonds in question?

Mr. BUTLER: Yes, sir.

Mr. SANDERS: And I object to it as immaterial, irrelevant, and incompetent until the fact of sale and the price and terms of sale have been proven.

43 The COURT: The facts of sale have been proved and I will allow the question to be answered.

Plaintiff's counsel excepts.

A. I can.

By Mr. BUTLER:

Q. Just state them in order.

A. The first sale was September 12th, 1874, 10 bonds Jeffersonville, Madison and Indianapolis railroad second mortgage, $7,100; October 10th, 1874, 10 bonds, $13,985; October 12th, 1874, 13 bonds, $9,058.50; February 11th, 1879, 5 bonds, $4,776.39. That is all I see here; that is all until the auction sale of May, 1879.

Mr. BUTLER: I would like to have that paper marked for identification.

The paper referred to is marked Defendant's Exhibit No. 2 for identification.

At the time of this overdraft, April, 1874, my duties were those of assistant teller for both tellers. I recollect the time when this notice that was put in evidence, signed by Mr. Thompson, early in May, came into the bank. I recollect such a notice being served. I was there at the time. I remember the circumstances. It was the day it was dated, the 5th of May.

Q. Was there anything about this matter which attracted your particular attention to it?

A. There was. I remember the fact of the service. It was by a clerk. That was the first, so far as I knew, of any notice or claim of Mr. Thompson's ownership of these bonds.

Q. Now, I ask you if at the time the fact of the magnitude of this overdraft didn't draw your special attention to the circumstances connected with it and immediately following it?

Objected to as immaterial and irrelevant. Objection overruled. Plaintiff's counsel excepts.

A. Certainly.

44 Recross-examination by Mr. SANDERS:

The bank fixed a value on these securities at the time they received them, as near as could be ascertained. I don't know that it was the market value. The value which the bank fixed upon the Bloomington, Indianapolis and Western 20 bonds, $20,000 extension, was 75 per cent., or $15,000.

Q. Give us the next. I want all but the Jeffersonville.

A. $6,000 Peoria, Peru and Springfield first-mortgage bonds, also

at 75, $4,500; 23 Missouri, Iowa and Nebraska first-mortgage bonds, at 40 per cent., $9,200; $3,000 New York, Boston and Montreal second-mortgage bonds, at 40, $1,200; 1,534 shares Hampshire and Baltimore Coal Co., at 50, $7,670; 50 shares Pelham Manor and Land Company, at 50, $2,500.

Q. What is the total?

A. $91,170.

Q. When you fix values upon securities for the purpose of certification don't you do it at the market value, as near as you can ascertain it?

A. We ascertain it as near as possible. Sometimes we ask the person the value—what he considers the securities worth.

Q. Do you know anything now to the contrary of the market value of these securities—the I., B. and W., Peru and Springfield, Missouri and Nebraska, New York, Boston and Montreal, and the stock having less market value at the time when these certifications were made than those specified in the account which you have given?

A. I don't understand you.

Q. Was not that the fair market value of those securities at that time?

A. I don't know.

ELIAS B. VANDERVEER sworn for the defence.

Direct examination by Mr. BUTLER:

45 In April, 1874, I was paying teller of the St. Nicholas bank. I knew of the dealings of Capron & Merriam with the bank at that time, and previously I had been in the habit of certifying their checks—that is, the checks of Capron & Merriam, drawn upon the bank in favor of various parties, certified in the regular course of business. Their daily dealings with the bank were large. I presume they would run anywhere from $150,000 to $200,000 or $300,000 a day.

Q. Will you look at the checks I now hand you and state if the certifications on them are in your handwriting (handing package of checks to witness)?

A. Yes, sir.

Q. When were those certifications made?

A. April 18th, 1874.

Q. Can you give us the aggregate amount of those checks?

A. I could not without reference to the books.

Q. We have got the figures here. They have been carefully gone over and they correspond—$236,802.70?

A. Yes, sir.

The checks handed to the witness are offered in evidence by defendant's counsel and are marked Defendant's Exhibits 3 to 32, inclusive.

Cross-examination waived.

Defendant rests.

Mr. SANDERS: The balance claimed as due on the 31st of May, 1879, includes a payment of $800 made by the bank for assessments in January, 1879, on the Indianapolis, Bloomington and Western Railway Company bonds. That fact appears on the paper marked Defendant's Exhibit No. 2 for identification, and I state it now so that it may appear upon the record.

Plaintiff rests.

Defendant's counsel moves for a direction of a verdict for the defendant on the ground that upon the uncontradicted evidence in the case it appears that the defendant was a holder for value of
46 the securities in suit and entitled to the possession thereof.

Plaintiff's counsel requests the court to direct the jury to find a verdict that the plaintiff recover possession of the bonds and coupons in suit, or, if that cannot be had, their highest market value since May 5th, 1874, on the ground that the contract of certification by the defendant was void, as being unlawful, being certification of checks of Capron & Merriam when they had no money on deposit to their credit with the defendant at the time of such certification, and that the contract was unlawful and the defendant cannot hold these securities as against such unlawful certification, and on the further ground that the bank did not take the securities in suit in the ordinary course of business;

Failing that, that the court direct the jury that the plaintiff recover possession of 25 Jeffersonville, Madison and Indianapolis R. R. 2d-mortgage bonds and the certificate representing the 20 Indianapolis, Bloomington and Western 1st-mortgage bonds, or, if that cannot be had, their highest market value since the 28th of May, 1879;

Or, failing that, that the court direct the jury that the plaintiff recover possession of 25 Jeffersonville, Madison and Indianapolis R. R. 2d-mortgage bonds, or, if that cannot be had, their highest market value since the 28th of May, 1879;

Or, failing that, for a similar verdict for 20 of said bonds;

Or, failing that, for a similar verdict for 15 of said bonds;

Or, failing that, for a similar verdict for 10 of said bonds;

Or, failing that, for a similar verdict for 5 of said bonds;

Or, failing that, for a similar verdict for the recovery and
47 possession of the 20 Indianapolis, Bloomington and Western R. R. Extension 1st-mortgage bonds on the ground that on the 28th of May, 1879, the defendant had no lien upon said 25 Jeffersonville, Madison and Indianapolis R. R. 2d-mortgage bonds, on the 28th of May, 1879, after the sale of the other securities held by the bank, as there remained nothing due on the certifications of the 18th of April, 1874.

Plaintiff's counsel requests the court, if it should decide against the plaintiff as to these requests, that the plaintiff be permitted to go to the jury on the fact as to whether or not the defendant is not liable for the full value of Mr. Thompson's Jeffersonville, Madison and Indianapolis R. R. bonds, which they sold without notice to him, and he is entitled to have applied on the bank's account the

highest market price which they would realize in extinguishment of the bank's claim, leaving the rest of the securities free and clear.

By direction of the court the jury rendered a verdict for the defendant; to which direction plaintiff excepts.

Plaintiff's counsel also excepts to the court's refusal to allow the case to go to the jury on the questions presented.

Exceptions to be heard in the first instance at the general term.

48 N. Y. Supreme Court.

JENNIE M. THOMPSON and ANO., as Ex'rs, &c.,
ag'st
THE ST. NICHOLAS NAT'L BANK.

Messrs. Taylor & Ferris, def't's att'ys.

GENTLEMEN: Please take notice that on the annexed case and exceptions I shall move the court, at a general term thereof to be held at the county court-house, in said city, on the first Monday in January, 1888, at the opening of the court, or as soon thereafter as counsel can be heard, that the exceptions be sustained and a new trial granted.

Dated N. Y., December 1, 1887.

Yours, &c., LEWIS SANDERS, *Pl'ffs' Att'y.*

49 At a circuit of the supreme court held in the county court-house, in the city of New York, on the 27th day of March, 1888.

Present: Hon. Edward Patterson, justice.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors, &c., of John B. Thompson, Deceased, Plaintiffs,
against
THE SAINT NICHOLAS NATIONAL BANK, Defendant.

The defendant having obtained an order to show cause why the taxation of the costs by the clerk should not be reopened and why the clerk should not be directed to include in costs as adjusted and taxed therein an extra allowance of two thousand dollars to the defendant herein or why an extra allowance of two thousand dollars should not be granted to the defendant herein and be inserted in its judgment and why the defendant should not have such other relief in the premises as may be just and right, and the motion thereunder having come on regularly to be heard, on reading and filing the order to show cause, the two affidavits of Morris P. Ferris, the bill of costs as taxed, and the affidavit of Lewis Sanders in opposition, and on the order of Mr. Justice Lawrence granting an extra allowance, made April 19th, 1886, the plaintiffs having made the following preliminary objection, that the action of the taxing officer
50 can only be reviewed by an appeal therefrom and on the original paper presented to him by a judge at chambers, and

that the application for an extra allowance should be made to the general term, and that it is too late to make the same, defendant having taxed its costs, after hearing Mr. Taylor, of counsel for the defendant, in support of the motion, and Lewis Sanders, of counsel for the plaintiffs, in support of the preliminary objections and in opposition to the motion—

It is ordered that the said preliminary objections be, and they are hereby, severally overruled.

And it is further ordered that the said taxation of costs be, and the same is hereby, opened and set aside, and that the defendant have a retaxation thereof, the allowance made upon the former trial hereof not to be taxed.

It is further ordered that the defendant have, and hereby is, granted an extra allowance of two thousand dollars, the same to be included in the judgment to be entered herein in favor of the defendant against the plaintiff.

Enter.

J. S. C.

51 At a general term of the supreme court held in and for the city and county of New York, at the county court-house, in the city of New York, on the 4th day of January, 1888.

Present: Hon. Charles H. Van Brunt, presiding justice; Hon. Charles Daniels, Hon. John R. Brady, justices.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors, &c., of John B. Thompson, Deceased, Plaintiffs,
against
THE SAINT NICHOLAS NATIONAL BANK, Defendant.

This action having been brought on for trial at a circuit court held in and for the city and county of New York, on the 12th and 13th days of October, 1887, before the Hon. Edward Patterson, justice, and a jury, and the said court, after having heard all the testimony offered on behalf of both parties, having directed the said jury to render a verdict for the defendant, and the said plaintiffs having duly excepted to the said direction and also having made various other exceptions to the rulings of said court, and the court having ordered said exceptions to be heard in the first instance at general term, and the said plaintiffs having moved this court for a new trial on such exceptions, now, after hearing Mr. Sanders,
52 of counsel for said plaintiffs, in favor of said motion and exceptions, and Mr. Butler, of counsel for the defendant, in opposition thereto, and on motion of Taylor & Ferris, attorneys for the defendant, it is—

Ordered that the said motion for a new trial be, and hereby is, denied, and that the defendant have judgment against the plaintiffs upon the verdict with costs.

Supreme Court, City and County of New York.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors, &c., of John B. Thompson, Deceased, Plaintiffs,
against
THE SAINT NICHOLAS NATIONAL BANK, Defendant.

Judgment, 29th March, 1888.

The issues in this action having been brought on for trial before Mr. Justice Patterson and a jury at a circuit of this court held at the county court-house, in the city of New York, on the twelfth and thirteenth days of October, 1887, and the said court, after having heard all the testimony offered on behalf of both parties, having directed the said jury to render a verdict for the defendant, and the said plaintiffs having duly excepted to the said directions and also having made various other exceptions to the rulings of said court, and the court having ordered said exceptions to be heard in the first instance at general term, and the said plaintiffs having moved
53 at a general term of this court for a new trial upon such exceptions, and the said general term having denied plaintiffs' motion for a new trial and directed that the defendant have judgment against the plaintiffs upon the verdict with costs, and the said costs having been taxed at the sum of four hundred and forty-nine dollars and sixty-eight cents, and the court having granted to defendant an extra allowance of two thousand dollars and directed that the same be included in the judgment to be entered herein in favor of the defendant against the plaintiffs, now, therefore, on motion of Taylor & Ferris, attorneys for defendant, it is—

Adjudged that the complaint in this action be, and the same hereby is, dismissed on the merits, and that the defendant, The Saint Nicholas National Bank, recover of the plaintiffs, Jennie M. Thompson and John C. Thompson, as executors, &c., of John B. Thompson, deceased, the sum of four hundred and forty-nine dollars and sixty-eight cents for costs and the sum of two thousand dollars for an extra allowance, making together the sum of two thousand four hundred and forty-nine dollars and sixty-eight cents, and that the defendant have execution therefor.

54 New York Supreme Court, First Department.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of John B. Thompson, Deceased, Pl'ffs and App'l'ts,
against
THE ST. NICHOLAS NAT'L BANK, Def't and Resp'd't.

GENTLEMEN: Please take notice that the appellants hereby appeal to the court of appeals from the judgment of the supreme court, first department, entered herein March 29th, 1888, dismissing the complaint on the merits, together with costs and an extra allowance of $2,000, and will bring up for review on said appeal the order of

the general term, entered herein March 9th, 1888, overruling plaintiffs' exceptions and granting judgment on the verdict, the order of circuit —, entered herein October 17, 1887, directing verdict for defendants, and the order of circuit —, entered herein March 27, 1888, overruling plaintiffs' objections and granting an extra allowance of $2,000.

Dated N. Y., April 25th, 1888.

Yours, &c., LEWIS SANDERS,
Att'y for Appellants, 5 Beekman Street, New York City.

To James A. Flack, Esq., clerk of the city and county of New York, and Messrs. Taylor & Ferris, respondent's att'ys.

55 STATE OF NEW YORK, } *ss.:*
City and County of New York, }

I, James A. Flack, clerk of the supreme court in and for said county, do hereby certify that the foregoing consists of certified copies of the notice of appeal and the judgment-roll on file in my office.

In witness whereof I have hereunto set my hand and affixed my official seal this 2nd day of May, A. D. 1888.

[L. S.] JAMES A. FLACK, *Clerk.*

First Department, General Term.

JANUARY, 1888.

Charles H. Van Brunt, P. J.; John R. Brady, Charles Daniels, JJ.

JENNIE W. THOMPSON and Another, Executors, &c., }
against }
THE SAINT NICHOLAS NATIONAL BANK. }

Motion by plaintiff for a new trial upon exceptions ordered to be heard at the general term.

Lewis Sanders, for plaintiff; William Allen Butler, for defendant.

DANIELS, *J.:*

56 The action was brought to recover the possession of seventy-three mortgage bonds of the Jefferson, Madison and Indianapolis Railroad Company of the denomination of one thousand dollars and twenty mortgage bonds of the like denomination of the Indianapolis, Bloomington and Western Railroad Company. These bonds belonged to and were the property of John B. Thompson, the testator, in April, 1874. At that time he was dealing in stocks through Capron & Merriam, stock brokers in the city of New York. They had purchased stocks for him under his authority and in the course of their business, and they called upon him to furnish them with margins to have the stocks purchased or to be purchased held and carried by them. These bonds were all

transferred to the brokers and receipts taken for them, stating that they were to be held as margin on his individual stock transactions. The bonds were payable to bearer and in the usual form of railway securities.

These brokers were customers of the St. Nicholas National bank, making deposits and obtaining money from that institution, and they delivered all the bonds to the bank, to be held by it for the loans and indebtedness of the brokers. They failed on Monday, the 20th of April, 1874, and the testator was soon afterwards informed that these bonds had been passed into the possession of the bank. He demanded their possession from the bank, but their delivery to him was refused, and he commenced this action on the 18th of April, 1880, six years after the delivery of the bonds to the bank. Before the bonds were transferred and delivered to the bank and in December, 1873, the brokers made the following agreement with the bank: Agreement, dated the 2d day of December, 1873.—We hereby agree with the St. Nicholas National Bank of New York, in the city of New York, that in case that we shall become or be at any time indebted to said bank for money lent or paid to us or for our account or use or for any overdraft in any sum or amount then due and payable the said bank may, in its discretion, sell at the
57 brokers' board or at public auction or private sale, without advertising the same and without notice to us, all, any, and every collateral securities, things in action, and property held by said bank for securing the payment of such debt and apply the proceeds to the payment of such indebtedness, the interest thereon, and the expenses of the sale, holding ourselves responsible and liable for the payment of any deficiency that shall remain unpaid after such application.

CAPRON & MERRIAM.

And under its authority the bonds were sold by the bank to pay the deficiency in the account of the brokers with it. Before the sale of the bonds took place notice of their sale was delivered to the testator, but prior to the time mentioned in it for the sale of the bonds thirty-eight of them were otherwise disposed of; and the right to sell in that manner had been reserved in the agreement which the brokers made with the bank, but even if it had not been the testator does not appear to have been injured by the sales of these bonds, for it was agreed between the attorneys preceding the trial, and their stipulation was used as evidence in support of the facts mentioned in it, that the bank had used its best efforts to procure as large a price as possible for all the securities pledged to it by Capron & Merriam, including the bonds in suit, and that was all which either the agreement or the obligations of good faith required on the part of its officers to relieve it from liability if it had the right to sell and dispose of the bonds. The others were sold pursuant to the terms of the notice, and so were all the securities pledged to the bank by Capron & Merriam. After these sales were made and the proceeds fully realized the cashier of the bank testified that a small balance, amounting to about the sum of eighteen

hundred dollars, still remained unpaid upon their indebtedness to the bank.

58 The necessity for selling the bonds to pay the indebtedness of Capron & Merriam to the bank was denied on behalf of the plaintiffs, and it was claimed by their counsel that if any sale whatever of these bonds became necessary that a portion of them still remained after paying all the indebtedness of Capron & Merriam. This position is advanced upon the fact that on the 18th of April the brokers deposited with the bank the sum of $211,263.51, and that this deposit should be first applied to the payment of their indebtedness before resort could legally be had to the bonds. This position is sound, and it was really not denied on the part of the bank; but evidence was given to show the fact to be that after applying this deposit to the payment of the indebtedness of the brokers there still remained so large an amount owing from them as to exhaust the proceeds of these bonds. It was stated by the same witness that an indebtedness against the brokers of $28,657.31 existed in favor of the bank at the time when the deposit was made, which reduced the amount of the deposit itself, as the bank had the right to apply so much of it as was necessary to the payment of this balance to the sum of $182,606.20. It was further shown that on the 18th of April the bank certified checks, which were produced in court, for Capron & Merriam to the amount of $236,802.70, and paid other checks of theirs through the clearing-house on the same day to the amount of $17,529.67, and in cash over the counter the sum of $200, making in all the sum of $254,742.37, which the brokers were indebted to the bank for checks paid through the clearing-house, checks certified, and cash over the counter. Deducting from this the balance of their deposit on the 18th of April left due to the bank the sum of $72,136.17, for which it held and afterwards sold the bonds in controversy, and, as already stated, their proceeds failed to extinguish the entire amount of this indebtedness. It was

59 agreed by the stipulation that the bonds went into the possession of the defendant prior to the making of the certifications on the 18th of April, 1874, and that the certifications were made on the faith of the deposit of the bonds and all such other securities as were held by the bank for the account of Capron & Merriam.

The brokers were not, in fact, authorized to use the testator's bonds in this manner, but by this evidence the bank proved the fact to be that it had received the bonds in the usual course of business and for value afterwards advanced upon their faith and security, and that was all that was required to satisfy the rule so elaborately discussed by the counsel for the plaintiff and stated in the opinion in Davis Sewing Machine Co. *v.* Best, 105 N. Y., 59, 64. The burden was upon the defendant to prove that the bonds had been received by it in good faith, and that it had parted with value for them, entitling it so far to be protected as a *bona fide* holder, and its proof exhibited that to be the truth of the case.

But the main reliance of the plaintiffs for the support of their action has been placed upon sec. 5208 of the Revised Statutes of the

United States. By this section it has been provided that it shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association at the time such check is certified an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association in violation of this section shall subject such bank to the liabilities and proceedings on the part of the Comptroller, as provided for in section fifty-two hundred and thirty-four. Under this enactment it is insisted on behalf of the plaintiffs that the bank was incapable of taking or receiving these bonds
60 by way of security for its own certified checks, and that so far as they were sold to pay the indebtedness of Capron & Merriam on such checks the sale was illegal and the plaintiffs were entitled to recover; but while the statute has forbidden the officers, clerks, or agents of national banking associations from certifying checks unless the person or company drawing the check has on deposit with the association at the time that such check is certified an amount of money equal to the amount specified in such check it has not declared the check so certified to be inoperative or unlawful against the bank itself, but it has provided, on the contrary, that the check or checks so certified shall be good and valid obligations against the association, and the only effect declared to result from the act of certification is that the association shall be liable to proceedings on the part of the Comptroller for its dissolution. If it had provided that the check certified, without an equal amount of money being on deposit in the bank, should be void, or if it had not provided that such check or checks should be a valid obligation against the association, there would be ground for the position taken in behalf of the plaintiffs, for an obligation made in violation of a statutory provision forbidding it is, under ordinary circumstances, inoperative and void; but this section of the statute was not enacted in such a manner as to allow so extensive an application of its provisions. The principle upon which that application depends was rejected by the law-making authority, and notwithstanding the fact that the certification of the checks was forbidden, as Capron & Merriam did not have the amount of money on deposit with the bank to justify the certification, the law still declared the checks so certified to be good and valid obligations against the association; and assuming them to be so, as that must be done under this provision of the statute, the association was vested with the
61 resulting or incidental right to accept and receive securities which would indemnify and protect it against liability upon these goods and valid obligations. This right necessarily results from the fact that by the certifications the bank became legally liable to pay the amounts for which the checks were certified, and, being legally liable to that extent, no provision of law has forbidden it to protect itself against such liability by accepting and receiving securities which would be valid in its possession against any other

legal obligation assumed for the benefit of the person or persons delivering to it such securities. No authority has been cited or found going so far as to throw the least qualification of this legal principle, resulting, as it does, from the language of this enactment; but so far as the authorities have been cited, arising under the national banking law, they support the inability of the plaintiff to maintain his right to recover the bonds under this section of the banking law. In the case of Nat. B'k of Genesee *v.* Bostwick, 71 N. Y., 161, the mortgage, whose validity was passed upon and condemned by the court, was given in violation of a prohibition contained in the national banking law, which was subjected to no such qualification as this prohibition has been, concerning the certification of checks, and the decision in that case proceeded further than the Supreme Court of the United States was willing to extend the prohibition of the law, for in the same case, under the name of National Bank *v.* Whitney, 103 U. S., it was held by the court, reversing this decision of the court of appeals, that the United States was the only party that could take advantage of this violation of the statute, and that the mortgage itself was capable of being enforced against the surplus in favor of the party holding and insisting upon it, and this was again followed and sanctioned in Fortier *v.* New Orleans Bank, 112 U. S., 439, 451. A further ruling, important in its effect upon the present controversy, was made in National Bank *v.* 62 Stewart, 107 U. S., 676, where it was held, although the statute prohibited loans by national banks on the security of the shares of their own capital stock, that the transactions could not be questioned by a party to it after the shares themselves had been sold and their proceeds applied, as the bonds and their proceeds have in this case, to the extinguishment of the indebtedness. In all these authorities the principle or policy embodied in this section of the statute has been followed, that the transaction can only be regularly questioned by the authorities of the United States in a proceeding against the association for its violation of the statute. This principle, although supported by the general policy of the law, was not so directly applicable in the other cases as it is in this, for here it has been incorporated into and made a part of the section itself.

And it is the only legal consequence or result which the law has declared shall follow the certification of the checks where the drawer has not on deposit with the association at the time an amount of money equal to the amount specified in the certified checks. The court was, therefore, right in holding, at the trial, that the bank became a holder for value of the bonds in controversy by certifying these checks for Capron & Merriam, from whom the bonds for this object had been previously received.

The Indianapolis, Bloomington and Western bonds were surrendered by the defendant to the Union Trust Company on a plan for the reorganization of the railroad company, for which certificates were issued, which stood in lieu of the bonds, and these certificates were sold at the same time with the other securities. This surrender became a necessity because of the reorganization of the railroad company, and it was not made in violation of any of the obligations

of the bank; but if it had been, the violation would be no more than technical in its effect, for the plaintiff was in no manner
63 injured by the change. No loss whatever appears to have resulted to him or in these securities by the change which was then made; neither was the bank involved in any liability because of the demand made on behalf of or by the testator for the delivery of the bonds to him, for as long as the bank held them as legal securities for its protection against the moneys it had paid upon the certified checks it was not bound to surrender or deliver them to the testator without the payment or tender of the amount of the indebtedness for which it held the bonds.

At the close of the case each of the parties requested the court to direct a verdict in their favor. The plaintiff's counsel added to this the further request that the case should be submitted to the jury on the fact whether the defendant was not liable for the full value of the Jefferson, Madison and Indianapolis railroad bonds which they sold without notice to him and whether he was entitled to have applied on the bank's account their market price which they would realize in extinguishment of the bank's claim, leaving the rest of the securities free and clear. This was the only request made for the submission of any part of the controversy to the jury, and that was regularly refused for the reason already stated, that in the disposition of the bonds the defendant had used its best efforts to procure as large a price as possible for them when they were sold. Upon the credibility of the witnesses no desire was expressed to submit the case to the jury, but in all other respects than that just stated it was presented by the counsel on each side as dependent upon the application of legal principles, and it was so disposed of by the court in the direction given to the jury to render a verdict for the defendant. Neither of the exceptions taken rest upon the violation of any legal rule, but the case was disposed of, as the facts required it to be, at the trial, and the plaintiffs' mo-
64 tion should be denied and judgment directed for the defendant on the verdict with costs.

Concur.

C. H. V. B.

I concur.

J. R. B.

65 At a special term of the supreme court held in and for the city and county of New York, at the county court-house, in said city, on the 27 day of Apr., 1889.

Present: Hon. Edward Patterson, justice.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of the Last Will and Testament of John B. Thompson, Deceased, Plaintiffs & Appellants,

against

THE SAINT NICHOLAS NATIONAL BANK, Defendant & Respondent.

This cause having been brought on upon the remittitur herein sent down from the court of appeals and now filed in this court, by

which remittitur it appears that an appeal was taken by the plaintiffs from the judgment of this court to said court of appeals, and that such appeal has been dismissed and the judgment of this court confirmed with costs, and that the record and proceedings had been directed by said court of appeals to be remitted to this court and this court directed to enforce the said judgment of the court of appeals according to law:

66 Now, therefore, on motion of Taylor and Ferris, attorneys for the defendant, it is hereby—

Ordered and adjudged that the judgment of the said court of appeals be, and the same is hereby, made the judgment of this court, and that the defendant have execution against the plaintiffs for the costs, when adjusted by the clerk and inserted in this judgment, as well as for the amount adjudged to be recovered in and by the judgment of this court in this cause, entered on the 29th day of March, 1888, and that this order be annexed to the judgment-roll.

67 [Endorsed:] N. Y. supreme court. Jennie M. Thompson and ano., plaintiffs, against The Saint Nicholas National Bank, defendant. Order. Copy of cert. copy. Taylor & Ferris, attorneys for defendant, 111 Broadway, New York. To attorney for —. Filed April 27th, 1889.

SIR: Take notice that the within is a copy of an order this day entered herein.

Dated N. Y., Apr. 27th, 1889.

TAYLOR & FERRIS,
Att'ys for Def't, 111 *Broadway, N. Y.*

To Lewis Sanders, Esq.

68 Supreme Court, City and County of New York.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of the Last Will and Testament of John B. Thompson, Deceased, Plaintiffs,
against
THE SAINT NICHOLAS NATIONAL BANK, Defendant. } Judgment.

A trial of the issues in this action having been duly had before Honorable Edward Patterson and a jury on the twelfth day of October, 1887, and the jury having rendered a verdict in favor of the defendant under the direction of the court, and the court having ordered the exceptions taken upon such trial by the plaintiffs to be heard in the first instance at the general term, and the said general term having sustained the ruling of the trial court and having directed judgment to be entered in favor of the defendant against the plaintiffs with costs, and judgment having been entered in favor of the defendant against the plaintiffs in the sum of two thousand four hundred and forty-nine dollars and sixty-eight cents on the twenty-ninth day of March, 1888, and the plaintiffs having appealed from

said judgment to the court of appeals, and the court of ap-
69 peals having sent hither its remittitur, filed herein on the twenty-seventh day of April, 1889, by which it appears that the said court of appeals has affirmed the said judgment in all things with costs and has given judgment accordingly and has remitted the judgment of said court of appeals to this court to be enforced according to law, and this court, by an order duly entered herein on the twenty-seventh day of April, 1889, having ordered that the said judgment be made the judgment of this court, and the costs having been adjusted at the sum of one hundred and thirty $\frac{54}{100}$ dollars ($130.54):

Now, on motion of Taylor and Ferris, defendant's attorneys, it is adjudged that the said judgment of the said court of appeals be, and the same is hereby, made the judgment of this court, and that the defendant have judgment against the plaintiffs for the sum of one hundred and thirty — ($130.54) dollars, costs as adjusted by the clerk, and that the said defendant have execution therefor, as well as for the amount adjudged to be recovered in and by the judgment of this court duly entered in this cause on the twenty-ninth day of March, 1888.

Judgment May 2, 1889.

A copy.

[L. S.] EDWARD F. REILLY, *Clerk.*

70 Endorsed: Supreme court, city and county of New York. Jennie M. Thompson and John C. Thompson, as ex'rs, &c., of John B. Thompson, dec'd, plaintiffs, against The Saint Nicholas National Bank, defendant. Copy cert. copy judgment and notice of entry. Taylor & Ferris, attorneys for defendant, 111 Broadway, New York. To Lewis Sanders, Esq., attorney for pl'ffs, 5 Beekman St., N. Y. Filed May 2, 1889, 12 h. 51 m.

SIR: Take notice that the within is a copy of a judgment this day entered herein.

Dated New York, May 2, 1889.

TAYLOR & FERRIS,
Att'ys for Def't, 111 *Broadway.*

71 JENNIE M. THOMPSON & ANO., as Executors, &c., Appellants,
vs.
THE ST. NICHOLAS NATIONAL BANK, Respondent.

APRIL 16TH, 1889.

Lewis Sanders, for app'l'ts; Wm. Allen Butler, for resp't.

RUGER, *Ch. J.:*

The uncontroverted proof on the trial established the following facts, viz: That on the 18th day of April, 1874, Capron & Merriam, stock brokers in New York, deposited with the defendant, a national bank, ninety-three coupon railroad bonds, payable to bearer, of the

par value of $1,000 each, as security for any indebtedness which they then were or might become liable for to such bank, with authority to sell such securities either at public or private sale without advertisement or notice and apply the proceeds in payment of such indebtedness. Upon the same day and upon the faith of such deposit the defendant promised to pay Capron & Merriam's checks in favor of third parties to the amount of upwards of $236,000,
72 and simultaneously certified checks to that amount, which were presented by and paid to the holders thereof during the same day. On Monday, the 20th of April, 1874, Capron & Merriam failed, owing the defendant a balance of account of about $72,000, arising out of the transactions of the 18th day of April, 1874. This sum was made up by charging Capron & Merriam with the amount of the checks certified and paid on the 18th of April, certain other checks paid through the clearing-house on the morning of that day, and a balance of account remaining unpaid upon the transactions of the preceding day and deducting therefrom the amount of their deposits, being about $211,000, made on April 18th. On the 5th day of May, 1874, the plaintiffs' testator served a written notice upon the defendant to the effect that the bonds in question were his property and forbidding them from parting with the same except by his order and demanding an account showing
73 what lien the defendant claimed to have on the bonds.

Upon the trial the plaintiffs proved that their testator, previous to April 18th, 1874, owned such bonds, and on that day and the day previous transferred them to Capron & Merriam, to be held as margins on his individual stock transactions.

No payment upon the indebtedness of Capron & Merriam to the defendant was ever made, except some small sums received by way of interest and the receipts from sales of the bonds in question and others held as security for it. Such receipts never amounted to the sum of the indebtedness. No offer to pay such indebtedness was ever made by the plaintiffs' testator or request to redeem the bonds in suit or admission of any right in the bonds by the defendant. The defendant never, in terms, refused to render an account of its transactions with Capron & Merriam to the plaintiffs' testator, but it did omit to send a written statement thereof in response to his notice
74 requiring the same. The defendant subsequently sold all of the securities held by it, either at public or private sale, using its best efforts to obtain as large a price as possible for them, and realized less than the amount of the debt due to it from Capron & Merriam. The plaintiffs' testator, in October, 1879, claiming to be the owner of the bonds, demanded of the defendant their unconditional delivery to him, and in April, 1880, brought this action to recover their possession. Each party, on the close of the evidence, requested the direction by the court of a verdict, and the court granted the request of the defendant and ordered a verdict for it. To this direction the plaintiffs excepted.

The plaintiffs also asked to go to the jury, in case the court should refuse to direct a verdict for them upon certain grounds stated, upon the fact whether the defendant was not liable for the full value of

forty-eight certain bonds "which they sold without notice to plaintiffs' intestate, and he is entitled to have applied on the bank's account the highest market price which they would realize in
75 extinguishment of the bank's claim, leaving the rest of the securities free and clear." This was refused, and the plaintiffs excepted. The court ordered the exceptions to be heard in the first instance at the general term.

There were some exceptions to the admission or rejection of evidence by the court taken by the plaintiffs during the trial, but none are referred to in the appellants' brief on the argument before us, and they were all unimportant; neither has the exception to the refusal of the court to permit the plaintiffs to go to the jury on the alleged question of fact been argued or presented on the appeal. The refusal of the court was so obviously proper that it is unnecessary to spend time in discussing it.

It thus appears that the only exception in the case is to the direction of the court requiring the jury to find for the defendant. This exception presents the question whether, upon all of the facts of the case, the plaintiffs' — had established a right to demand the surrender of such bonds or any part thereof by the defendant to him.
76 We think there was no error in the disposition made of the case by the trial court. The complaint alleges the ownership of the bonds by the plaintiff; that on or about the 18th day of April, 1874, the defendant became wrongfully and illegally possessed of the same; that upon demand it had refused to deliver them up to plaintiff, and a demand of judgment for the return of the bonds —, and, in case that could not be had, a judgment for their value.

The answer denied all of the allegations of the complaint except its own incorporation and a demand of the bonds by the plaintiff, and for a second defense alleged the transfer of said bonds to it by Capron & Merriam as security for certain loans and demands made to and for said Capron & Merriam, the non-payment of the debt for which they were pledged, and a sale of such securities pursuant to the agreement under which they were pledged.

The issue in the case was thus a plain one. The plaintiff
77 claimed to be the absolute owner of the bonds, unaffected by any right which the defendant might assert in respect to them, and to maintain the action he was bound to show that no title passed to the defendant by their transfer or that at some time prior to the commencement of the action he had become entitled to the possession of such bonds or some part thereof (Duncan *vs.* Brennan, 83 N. Y., 487; Clements *vs.* Yturria, 81 N. Y., 285; Redman *v.* Hendricks, 1 Sandf., 32; Ingraham *vs.* Hammon, 1 Hill, 353; Patterson *vs.* Adams, 7 Hill, 126). Assuming the validity of the transaction by which the defendant became possessed of the bonds, this could be effected only by proof that the debt for which they were pledged had been wholly paid or the tender of a sufficient sum to discharge such debt. (Lewis *v.* Mott, 36 N. Y., 395; Bakeman *v.* Pooler, 15 Wend., 637; Talty *v.* Freedman's Saving Bank, 93 U. S., 321.)

This confessedly the plaintiff did not show. Various alleged equitable claims have been presented by the appellants as affecting the determination of this appeal; but, admitting their existence, the form of the action does not permit their consideration
78 here. The action was *replevin in cepit*-, and predicated upon the alleged wrongful taking by the defendant of the bonds in question from Capron & Merriam.

The application of the deposits of the 18th day of April to the extinguishment of the unpaid balance of account existing against Capron & Merriam on the morning of that day instead of the indebtedness created by the payment of the certified checks was properly made and could not be questioned by the plaintiff.

The demand upon which they were applied was a running account composed of a number of items accruing at different times, all equally secured by the collaterals held by the defendant, but which were always insufficient to discharge the whole debt. Under such circumstances, in the absence of any express application of payments by the parties, the law applies them to the earliest items of the account. (Truscott *v.* King, 6 N. Y., 147; Harding *vs.* Tifft, 75 N. Y., 461; Webb *v.* Dickinson, 11 Wend., 62; United States *v.* Kirkpatrick, 9 Wheaton, 720; Munger on Payments, 102.)

79 The main contention of the appellants is that the transaction by which the defendant certified checks for Capron & Merriam without having an equivalent amount of money on deposit to meet them was a violation of section 5208 of the United States Revised Statutes, and that no valid debt against Capron & Merriam was created thereby, or, in other words, that the defendant did not become a *bona fide* holder of such bonds by reason of payments made in pursuance of such alleged illegal and prohibited arrangement. The statute is as follows: "It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has a deposit with the association at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association, but the act of any officer, clerk, or agent of any association in violation of
80 this section shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four."

It will be seen that the statute affirms the legality of the contract of certification and expressly prescribes the consequences which shall follow its violation. It therefore appears that, so far from making the contract of certification void and illegal, its validity is expressly affirmed, and the consequences which follow a violation are specially defined and impliedly limit the penalty incurred to a forfeiture of the bank's charter and the winding up of its affairs. There is a clear implication from this provision that no other consequences are intended to follow a violation of the statute. It would, indeed, defeat the very policy of an act intended to promote the security and strength of the national banking system if its pro-

visions should be so construed as to inflict a loss upon them and a consequent impairment of their financial responsibility.

81 The decisions of the Supreme Court of the United States are uniform in giving this construction to the provisions of the national banking act (National Bank of Zenia *v.* Stewart, 107 U. S., 676; National Bank *v.* Matthews, 98 U. S., 621; National Bank *v.* Whitney, 103 U. S., 99). The principle decided in National Bank of Zenia *v.* Stewart seems to be in point. There the bank made a loan upon the security of shares of its own stock, which loan was prohibited by section 5201 of the United States Statutes. After the debt became due the bank sold the shares and applied their proceeds to the payment of the debt. The administrators of the debtor sued to recover the proceeds of the sale, and it was held that they could not recover, as the contract had been executed.

In National Bank *v.* Matthews the court held that a mortgage on real estate taken to secure an existing indebtedness and for future advances was a valid security in the hands of the bank, although by sections 5136 and 5137 of the Revised Statutes of the United States it was impliedly prohibited from taking such securities.

82 It was held that the Government alone was entitled to prosecute for the offense committed by the bank in taking a prohibited security, Justice Swayne saying, "The impending danger of a judgment of ouster and dissolution was, we think, the check and none other contemplated by Congress." The same principle was held by this court in The Atlantic State Bank *v.* Savery (82 N. Y., 291).

But we are further of the opinion that the section has no application to the question here, which concerns the relations between Capron & Merriam and the defendant alone. By the deposit in question Capron & Merriam secured the promise of the bank to protect their checks of a certain day for a specified amount. The certification of these checks was entirely aside from this agreement. That was a contract between the bank and the anticipated holders of the checks. Capron & Merriam had received the consideration for their pledge when the bank agreed with them to honor their checks. This would have been equally effectual between these parties without any certification.

83 That act was simply a promise to such persons as might receive the checks that they should be paid on presentation to the bank in accordance with the previous agreement with Capron & Merriam. The legal effect of the agreement was that the bank should loan a certain amount to Capron & Merriam and would pay it out on their checks to the persons holding them. It was entirely lawful for the bank to contract to pay Capron & Merriam's checks, and it did not affect the legality of that transaction that they also represented to third parties that they had made such an agreement and would pay such checks. Capron & Merriam cannot dispute their liability for the amount paid out in pursuance of such an agreement, and neither can any other party standing in the shoes of the bank depositor. The fact that the bank in connection with an agreement to pay such checks had also promised third parties

to pay them could not invalidate the liability previously incurred or impair the security which had previously been given to it upon a valid consideration. The fact of the certification was en-
84 tirely immaterial in respect to the liability incurred by Capron & Merriam to the bank.

We have been unable to discover any evidence in the case impairing the title to the bonds acquired by the bank through their transfer by Capron & Merriam to it. The purpose for which they were transferred by Thompson contemplated their possible and probable transfer and sale by Capron & Merriam, and the bank acquired a valid title to them by such transfer. The evidence showed that the transaction between Capron & Merriam and the bank was in the ordinary course of business pursued by the bank, and that it received the bonds in good faith for a valuable consideration. Within all authorities this gave it good title to such securities. (Welch *v.* Sage, 47 N. Y., 143; Murray *v.* Lardner, 2 Wall., 110; Davis Sewing Machine *v.* Best, 105 N. Y., 59.)

The bank, having acquired a valid title to the bonds, was authorized to deal with them for the purpose of effecting the object for which they were transferred by Capron & Merriam (Talty *vs.*
85 Freedman's Savings & Trust Co., 93 U. S., 321). Its right to hold the bonds continued so long as any part of the debt against Capron & Merriam remained unpaid. The plaintiffs' intestate could undoubtedly at any time have established his equitable right to a return of the bonds and procured their surrender by paying the amount for which they were pledged, but this he not only refrained from doing, but impliedly denied any right in the defendant by demanding the unconditional surrender of the bonds. This he never became entitled to, and of course is not authorized to recover their possession in this action.

The judgment should be affirmed with costs.

"All concur."

A copy.

H. E. SICKELS, *Reporter*,
Per C.

86 [Endorsed :] Thompson *vs.* The St. Nicholas National Bank. Opinion. Ruger, Ch. J. Filed May 31, 1889.

87 United States Supreme Court.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of the Last Will and Testament of John B. Thompson, Deceased, Plaintiffs in Error,

against

THE ST. NICHOLAS NATIONAL BANK, Defendant in Error.

Afterwards, to wit, on the sixth day of May, 1889, of the term for 1889, before the judges of the court of appeals of the State of New York came the said plaintiffs in error, by Lewis Sanders, their at-

torney, and say that on the record and proceedings aforesaid there is manifest error, in this, to wit, that the court ordered that the defendant have a verdict and judgment on the claim by plaintiffs to recover seventy-three second-mortgage bonds of the Jeffersonville, Madison and Indianapolis railway and twenty first-mortgage bonds of the Indianapolis, Bloomington and Western railway and damages for their detention, said bonds having been illegally detained by the defendant in error for certifications of the checks of Capron & Merriam without their having on deposit with said defendant at the time said checks were certified an amount of money equal to the several amounts specified in such checks or any amount, contrary to section 5208 of the Revised Statutes of the United States.

Whereas the court should have ordered a verdict and judgment for the plaintiffs; and this the plaintiffs in error are ready to verify.

88 Wherefore plaintiffs pray judgment reversing the judgment aforesaid for the errors — may be revoked, annulled, and altogether held for nothing, and that plaintiffs may be restored to all things they have lost by occasion of the judgment aforesaid.

LEWIS SANDERS,
Plaintiffs' Attorney.

89 [Endorsed:] U. S. Supreme Court. Thompson *vs.* St. Nicholas Nat'l Bank. Copy. Assignment of error. Lewis Sanders, pl'ffs' att'y, Temple court, 5 & 7 Beekman St., New York city. Service of a copy of the within paper admitted. New York, May 21, 1889. Taylor & Ferris, att'ys for def't. Filed May 31, 1889.

90 T. C. I. P.

Court of Appeals of the State of New York.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of the Last Will and Testament of John B. Thompson, Deceased, Plaintiff- in Error,
vs.
THE SAINT NICHOLAS NATIONAL BANK, Defendant in Error.
} Bond for Damages and Costs.

Know all men by these presents that we, Max Danziger, of No. 11 East 79th street, New York city, and Louis A. Wagner, residing at 1008 Lafayette avenue, in the city of Brooklyn, are held and firmly bound unto the above-named defendant in error, the said bank, in the sum of two hundred and fifty dollars, to be paid to the said bank; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the third day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-named plaintiffs in error have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the
T. C. 1 P. *the* court of appeals of the State of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiff- in error shall prosecute — to effect and answer all damages and costs if *he* fail to make *his* plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MAX DANZIGER. [L. S.]
LOUIS A. WAGNER. [L. S.]

Sealed and delivered and taken and acknowledged this third day of May, 1889, before me—

[L. S.] THEODORE CONNOLY,
Notary Public, City & County of New York.

91 [Endorsed:] Court of appeals. Jennie M. Thompson and John C. Thompson, as executors, &c., *vs.* The St. Nicholas National Bank. Bond for costs on writ of error. Lewis Sanders, pl'ffs' att'y, 5 Beekman Str., N. Y. city. Approved. Wm. C. Ruger, Ch. J. c't of appeals. Filed May 31st, 1889.

92 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the court of appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you, between Jennie M. Thompson and John C. Thompson, as executors of the last will and testament of John B. Thompson, deceased, plaintiffs, and The Saint Nicholas National Bank, defendant, in a plea of replevin in the detin*et*, a manifest error hath happened, to the great damage of the said Jennie M. Thompson and John C. Thompson, as executors, &c., as is said and appears by — complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of May, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

WM. C. RUGER,
Ch. J. C't of Appeals, N. Y.

93 [Endorsed:] Supreme Court of the United States. Jennie M. Thompson and John C. Thompson, as executors, &c., plaintiffs in error, *vs.* The St. Nicholas National Bank, defendant in error. Writ of error. Lewis Sanders, attorney for plaintiffs in error. Service of a copy of the within writ of error is hereby admitted this 21st day of May, 1889. Taylor & Ferris, attorneys for defendant in error.

UNITED STATES OF AMERICA,
City and County of New York, Southern District of New York, } *ss:*

I, Edward F. Reilly, clerk of the city and county of New York, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the *following* pages, numbered from — to —, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of —— ——, plaintiff in error, against —— ——, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this — day of ——, in the year of our Lord one thousand eight hundred and eighty- —, and of the Independence of the United States the one hundred and —.

—— ——, *Clerk.*

STATE OF NEW YORK,
City and County of New York, } *ss:*

I, Edward F. Reilly, clerk of the said city and county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original judg't-roll constituting case on appeal to gen'l term & c't of appeals & remittitur of said court appeals, being a record in Thompson *et al. vs.* The St. Nicholas National Bank, transmitted to U. S. Supreme Court by virtue of the foregoing writ of error, addressed to c't of appeals, on file in my office, and that the same are correct transcripts therefrom and the whole of such originals, said transcripts consisting of ninety-two pages, as numbered.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 3rd day of June, A. D. 1889.

[Seal New York.]

EDWARD F. REILLY, *Clerk.*

$10.65.

94 Court of Appeals of the State of New York.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of the Last Will and Testament of John B. Thompson, Deceased, Plaintiffs in Error,

against

THE SAINT NICHOLAS NATIONAL BANK, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To the Saint Nicholas National Bank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, in the county of New York, wherein Jennie M. Thompson and John C. Thompson, as executors of the last will and testament of John B. Thompson, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated Albany, May 6th, 1889.

WM. C. RUGER,
Ch. Judge C't of Appeals, N. Y.

95 [Endorsed:] U. S. Supreme Court. Jennie M. Thompson &ano., as ex., plaintiffs in error, against The St. Nicholas National Bank, defendant in error. Citation. Lewis Sanders, attorney for plaintiffs in error. Service of a copy of the within citation is hereby admitted this 21 day of May, 1889. Taylor & Ferris, attorneys for defendant in error.

Endorsed on cover: Case No. 13,574. New York court of appeals. No. 373. Jennie M. Thompson and John C. Thompson, as executors of the last will & testament of John B. Thompson, deceased, plaintiffs in error, *vs.* The Saint Nicholas National Bank. Filed June 14, 1889.

146 U.S. 240

Office Supreme Court U. S.
FILED,
APR 22 1892
JAMES H. McKENNEY,
CLERK.

United States Supreme Court.

JENNIE M. THOMPSON AND JOHN C. THOMPSON,
AS EXECUTORS OF JOHN B. THOMPSON,
Plaintiffs in Error,

against

THE SAINT NICHOLAS NATIONAL BANK,
Defendant in Error.

FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF AND POINTS FOR PLAINTIFFS IN ERROR.

LEWIS SANDERS,
Counsel for Plaintiffs in Error,
80 Broadway,
N. Y. City.

Hamilton Print, 12 Barclay St., N. Y. Telephone, 67 Cortlandt.

Supreme Court of the United States,

JENNIE M. THOMPSON and another, as Executors, &c.,

Plaintiffs in Error

against

THE ST. NICHOLAS NATIONAL BANK,

Defendant in Error.

Brief and Points for Plaintiffs in error.

The writ of error runs to review a judgment of the Court of Appeals of the State of New York, which affirmed a judgment entered upon an order of the General Term of the Supreme Court, First Department, overruling exceptions taken at the Circuit by plaintiffs to a verdict directed for the defendant.

The Facts.

This action, one of replevin in the *detinet*, was brought by the late John B. Thompson, for whom, on his death on

November 12th, 1886, the present plaintiffs were substituted, to recover bonds of the par value of $93,000.

Mr. Thompson deposited with a firm of brokers, Capron & Merriam, on the 17th of April, 1874, seventy-four second mortgage bonds of the Jeffersonville, Madison and Indianapolis Railway Company, of the par value of $74,000, and on the 18th of April, 1874, twenty five Indianapolis, Bloomington and Western first mortgage extension bonds, of the par value of $25,000, which bonds Capron & Merriam agreed should be "*held* as margin on his (Thompson's) individual stock transactions" (pp. 6 and 7).

On the 18th of April, 1874, Caron & Merriam diverted ninety-three of these bonds to their own use, by depositing with the defendant seventy-three of the Jeffersonville, Madison and Indianapolis bonds, and twenty of the Indianapolis, Bloomington and Western bonds, to be used against certifications of Capron& Merriam's checks (pp. 12 and 13).

On the trial no question was raised as to Mr. Thompson's ownership of the bonds or their diversion, or as to any indebtedness of Thompson to Capron & Merriam; and defendant's counsel stated that he "should not ask to dismiss " the complaint for want of tender made from Thompson " to Capron & Merriam" (p. 11).

On April 20th, 1874, Capron & Merriam failed, and on May 5th, 1874, Mr. Thompson, in writing, notified defendant of his ownership of the bonds, and demanded "an ac- " count, showing what lien you have, or claim to have, on " said bonds" (p. 8). The defendant would render no account of their claim, but proceeded to sell some of the Jeffersonville, Madison and Indianapolis bonds, without no tice to Mr. Thompson, at private sale, having other bonds belonging to Capron & Merriam which they might have sold for about $25,000.

On May 20th, 1879, defendant notified Mr. Thompson

that the bonds, *i. e.*, the remaining bonds, would be sold May 28th. Mr. Thompson then demanded his bonds (p. 9), which defendant withheld and sold on May 28th, 1879, at public auction (p. 9).

On this proof plaintiff rested (p. 12).

The defendant then undertook to prove itself to be a holder for value.

It was stipulated that the bonds in suit came into possession of the defendant on the 18th of April, 1874, before the certifications by the defendant on that day of Capron & Merriam's checks, and that such certification was made upon the faith of the bonds and of *such other securities* as were held by the bank for account of Capron & Merriam, without waiving the claim that national banks have no right to certify checks under the circumstances of this case (pp. 12 and 13).

These certifications, amounting to $236,802.70 (p. 16), were the only claim made against the bonds as per stipulation just quoted. Had any other been made it would have been extinguished the same day by the deposit made by Capron & Merriam of $212,136.17 (p. 16).

Assignment of Error.

Error is assigned that the Court directed a verdict for the defendant on plaintiffs' claim to recover the 93 bonds and damages for their detention, said bonds having been illegally detained by the defendant in error against the certifications of the checks of Capron & Merriam, without their having on deposit with said defendant at the time said checks were certified an amount of money equal to the several amounts specified in such checks, or any amount contrary to section 5208 of U. S. R. S. (pp. 43 and 44).

The Statutes.

U. S R. S., Sec. 5208, provides, "It shall be unlawful for "any officer, clerk or agent of any national banking asso- "ciation to certify any check drawn upon the association "unless the person or company drawing the check has on "deposit with the association, at the time such check is "certified, *an amount of money equal to the amount speci- "fied in such check.* Any check so certified by duly au- "thorized officers, shall be a good and valid obligation "against the association, but the act of any officer, clerk, "or agent of any association, in violation of this section, "shall subject such bank to the liabilities and proceedings "on the part of the comptroller, as provided for in section "fifty-two hundred and thirty-five."

This statute has received added emphasis by the act of 1882, which is as follows:

"That any officer, clerk or agent of any national banking "association who shall willfully violate the provisions of "an act entitled 'An act in reference to certifying checks "by national banks,' approved March third, eighteen "hundred and sixty-nine, being section fifty-two hundred "and eight of the Revised Statutes of the United States, or "who shall assent to any device, or receive any fictitious "obligation, direct or collateral, in order to evade the pro- "visions thereof, *or who shall certify checks before the "amount thereof shall have been regularly entered to the "credit of the dealer upon the books of the banking asso- "ciation*, shall be deemed guilty of a misdemeanor, and "shall, on conviction thereof, in any Circuit or District "Court of the United States, be fined not more than five "thousand dollars, or shall be imprisoned not more than "five years, or both, in the discretion of the Court."

U. S. Statutes at Large, vol. 22, Laws 1882, Chap. 290, Sec. 13, p. 166.

POINTS.

I.—A NATIONAL BANK MAY NOT, THROUGH A CONTRACT CONDEMNED AS UNLAWFUL BY ITS ORGANIC LAW, ACQUIRE FROM THE FRAUDULENT LIENORS OR BAILEES OF NEGOTIABLE INSTRUMENTS AN INDEFEASIBLE TITLE THERETO AS AGAINST THE TRUE OWNER.

Capron & Merriam received the bonds in suit under an agreement that they were "to be held as margin on his "(Thompson's) individual stock transactions" (pp. 6 and 7). Mr. Thompson bought no stock against these bonds (p. 7). The defendant absolved the defendant from making a tender to Capron & Merriam before suit, if any were necessary, both by objecting to evidence that nothing was due and by express statement (p. 11). According to the undisputed evidence and the stipulation (pp. 12 and 13) Capron & Merriam, on the morning of the 18th of April, 1874, unlawfully hypothecated Mr. Thompson's bonds with defendant, "and that the certifications made by the bank were on "the faith of the deposit of said bonds and of such other "securities as were held by the bank for the account of "Capron & Merriam." This makes out a clear case of unlawful diversion by Capron & Merriam of Mr. Thompson's bonds, and requires from defendant proof that it became the holder of the bonds in good faith, for value, in the ordinary course of business. The only evidence offered by defendant to sustain such position is the unlawful certification of Capron & Merriam's checks. In *Felt* v. *Heye*, 24 How. (N. Y.), 361, the Court held that the real owner of promissory notes which were unlawfully diverted by the pledgee, he, placing them as collateral security to an usurious loan, could not attack the loan for usury, not being in privity with the borrower—the pledgee—the lender having no knowledge but that the borrower owned the collateral; but held also that the owner could recover, be-

cause an usurious, being an unlawful contract, the lender did not acquire the promissory notes pledged as collateral in good faith in the ordinary course of business.

In *Clarke* v. *Shee*, Cowp. 197, where the plaintiff's clerk took money and negotiable notes belonging to plaintiff, and with them bought of defendant chances of the coming up of tickets in the State Lottery of 1772, contrary to the lottery act of that year, to the amount of £459, Lord Mansfield held that the plaintiff was entitled to recover. "Here "the plaintiff sues for his identified property, which has "come to the hands of the defendant iniquitously and ille- "gally, and in breach of the Act of Parliament. There- "fore, they have no right to retain it; and, consequently, "the plaintiff is well entitled to recover."

"The party guilty of usury in the transaction by which "he obtains property, is not a *bona fide* purchaser, so as "to hold against the real owner."

The Belmont Branch Bank v. *Hoge*, 7 Bosw., 556.

"Here the defendant sets up against the true owner of "the note the great doctrine of the law merchant, that the "holder of a negotiable bill or note who has received it in "good faith, for value, before its maturity, may retain it "against the whole world. Now, the good faith is a vital "element of this doctrine. And can that be said to have "been done *in good faith*, or in the usual course of trade, "which is done contrary to the positive prohibition of the "statute, and which the statute declares to be void? We "are satisfied that it cannot."

Reutgen v. *Parks*, 2 Sandf., Sup. Ct. Rep. (N. Y.), 65.

By Section 5201 of the R. S., national banks are prohibited from making any loan or discount on the security of its own shares unless necessary to prevent loss on a debt previously contracted, subject in case of violation to a receivership and a forfeiture of charter.

In the *Bank* v. *Lanier*, *infra*, Culver, a stockholder, pledged his stock to the bank for a present loan, giving the bank power of attorney to transfer the shares, keeping possession, however, of the certificate of stock, which he afterwards sold to Lanier & Handy. The bank, under Culver's power of attorney, transferred Culver's stock to pay his firm's debt to the bank. Lanier & Handy presented their certificates to the bank duly endorsed and demanded new ones, which the bank refused to issue. Lanier & Handy then brought an action in damages for such refusal, and the bank set up, by way of defence, the loan to Culver's firm on the pledge of the stock and sale of fifty shares under his power of attorney to pay the loan.

The Court said:

"Without pursuing the subject further, it is clear that "the contract between the South Bend Bank and Culver "was illegal, and cannot, therefore, be pleaded in avoidance "of any duty imposed on the bank. * * *

"The contract, in its inception, was in violation of the "law, and the bank cannot complain if it is made to suffer "in consequence of it." * * *

"It remains to be seen whether, on the case stated, "Lanier & Handy can recover of the bank for a breach of "corporate duty, notwithstanding the specific shares had "been already transferred to other persons. * * * And "in considering this question we are relieved of any neces-"sity of deciding between conflicting equities, for this suit "does not seek to disturb the title of the above purchasers "of the stock. It leaves them in possession of the property,

" and undertakes to subject the bank to damages for refus-
" ing to transfer the stock to the defendants in error."

Bank v. *Lanier* 17 Wal., 375-7.

A comparison of the two cases discloses that the case at bar is even stronger against the bank than the Lanier case.

1st. In the Lanier case, at the time of the bank's loan to Culver, the stock was Culver's.

In the case at bar, at the time defendant's certification of Capron & Merriam's checks, the bonds belonged to Mr. Thompson.

2d. This action, like the Lanier case, does not seek to disturb the contracts made by the bank with either principals, Capron & Merriam, or the holders of the certified checks. Whatever liability Capron & Merriam had to the bank or the bank had to the holders of the checks, will not be affected by this action.

3d. The defence in each case, a loan on stock and a loan by certifying checks, is a contract prohibited to the banks under the same penalty.

4th. In each case the owner, unconnected with any transactions with the bank, is seeking his property or its value.

The contract of December 2d, 1873, between Capron & Merriam and the bank does not cover securities belonging to third parties, nor certifying checks without money on deposit; had it done so, it would have been illegal; not doing so, the contract is irrelevant.

"A contract of a corporation which is *ultra vires*, in the "proper sense—that is to say, outside the object of its cre- "ation, as *defined in the law of its organization*, and, there- "fore, beyond the powers confered upon it by the Legis- "ture, is not voidable only, but wholly void and of no "legal effect. The objection to the contract is not merely "that the corporation ought not to have made, but that it "could not make it. The contract cannot be ratified by "either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action founded upon it."

Cent. Transp. Co. v. *Pullman Car Co.*, 139 U. S., 59–60.

"Undoubtedly there are such decisions of courts of high "authority, and there is such a principle, very sound in its "application to appropriate cases. But we understand the "rule in such cases to stand upon the broad ground that "the *contract itself is void*, and that neither what has been "*done under it*, nor the *action of the Court can infuse any* "*vitality into it*. Looking at the case as one where the "parties have so far acted under such a contract that they "cannot be restored to their original condition, the Court "inquires if relief can be given independently of the con- "tract, or whether it will refuse to interfere as the matter "stands."

Penn. Co. v. *St. Louis, and A. R. R.*, 118 U. S., 317.

"Can they found such a right (of enforcement) on an "agreement void for want of corporate authority and for- "bidden by the policy of the law? To hold that they can "is, in our opinion, to hold that any act performed in exe- "cution of a void contract makes all its parts valid, and

"that the more that is done under a contract forbidden by "law the stronger is its claim to enforcement by the "courts."

Thomas v. *Railroad Co.*, 101 U. S., 86.

No contract could be more distinctly *ultra vires*, in a proper sense, than one denounced by the corporation's organic law as unlawful, as is the certification of a check by a national bank without "the person drawing the check "has on deposit with the association at the time such "check is certified an amount of money equal to the "amount specified in such check" (Sect. 5208, R. S). The penalties attached to a violation of this section by the Act show that nothing but money, credited on the bank's books to the drawer of the check at the time of its certification, would answer the demands of the law.

II.—THE DEFENDANT BANK IS NOT A HOLDER FOR VALUE. TO BE SO IT MUST HAVE PAID VALUE TO CAPRON & MERRIAM, FROM WHOM IT RECEIVED THE BONDS.

The bank's certifications of Capron & Merriam's checks being illegal, furnish no consideration for the bonds. The bank parted with no money at the time of the illegal certifying. The only transactions between the bank and Capron & Merriam were the unlawful certifications, and these can furnish no consideration unless an unlawful contract may be the basis for a lawful remedy. Had the certifications been on checks payable to Capron & Merriam, they would have been nulities. The certifications were, however, contracts with the payees, which were binding on the bank by force of the Statute, Section 5208, and the subsequent payment of these certifications to the payees of the checks was not a payment to Capron & Merriam, who were no longer liable on the checks. In order to make the bank the holder for value, the money

must have been paid to Capron & Merriam, from whom defendant received the bonds. The certifications discharged Capron & Merriam's liability to the payees of the checks; the subsequent payment of the checks by the bank to the payees was not a payment for Capron & Merriam, but in discharge of the obligations of the bank to the payees, which the statute, condemning the certifications as illegal, nevertheless, made binding on the bank in favor of the payees. It follows, therefore, that the bank, not having paid Capron & Merriam anything for the bonds, is not a holder for value.

III.—THESE BONDS WERE NOT TRANSFERRED IN THE ORDINARY COURSE OF BUSINESSD OR IN GOOFAITH.

So far plaintiffs have been defeated upon the unwarranted assumption that it was essential to the maintenance of their case, to set aside as void or voidable the contract of certification of Capron & Merriam's checks by defendant, and to that end to invoke the aid of this statute.

This action has been treated in the courts below in the same manner as if the plaintiffs were the actual borrowers from the bank, and in receipt of the consideration under an unlawful contract, and were seeking to recover the securities pledged under such unlawful contract while retaining the benefits thereof. The plaintiffs have been subjected to the rule which is enforced against parties *in pari delicto.* This assumption is wholly unwarranted. The true position of the parties is this: The plaintiffs do not derive their title to the bonds through any arrangement made by Capron & Merriam with the bank, nor do they invoke the aid of the federal statute in the prosecution of this action. The plaintiffs' cause of action was fully made out by the proof of the ownership of the bonds in Mr. Thompson;

their delivery to Capron & Merriam for a specific purpose; the diversion of the bonds by Capron & Merriam by delivering them to the bank to secure the debts of Capron & Merriam; the demand on the bank and its refusal to surrender the bonds. It then became necessary for the defendant, and it attempted to show that it became possessed of the bonds in the ordinary course of business, for value parted with on the faith of the transfer of the possession of the bonds, and without notice of Mr. Thompson's rights. In the attempt to do this the bank showed that its only claim to hold Mr. Thompson's bonds for value advanced upon the faith of the actual possession thereof was for checks of Capron & Merriam certified by it, without having "*on deposit with the association* (defendant) an amount of money specified in such check," thereby subjecting the bank to a forfeiture of its charter for doing an act which the statute declares "*shall be unlawful.*" The question thus directly presented is, "Is such unlawful contract one made in the *ordinary course of business?*" or, "can the defendant, through the means of a contract condemned by statute as "unlawful," get the benefit of the law-merchant, which cuts off the equities of the true owner of negotiable securities when they were transferred *in the ordinary course of business,*
for value
without notice,
before maturity?"

It is a solecism to say that a contract in express terms denounced by statute as "unlawful," is made in the *ordinary course of* business. However universal the violation of the statute may be by the national banks, daily forfeiting their charters, in a court of justice, administering the law, a contract in violation thereof cannot in law be said to have been made in the ordinary course of busi-

ness, and if not made in the ordinary course of business, the negotiable quality of the securities did not pass to the bank, and it held them subject to the equities of the true owner.

This is not an open question.

"A note or stock taken to secure *the loan of money* "*which is illegal and forbidden by law, is not taken in the* "*ordinary course of business, and such a transaction does* "*not give the holder a superior right to that of a real* "*owner who has* been defrauded of his property by the "person who passed it away on the usurious contract."

"This point was so held in *Dean* agst. *Howell* (Lalor's "Supp., p. 39). Cowen, *J.*, says: 'This is not the good "faith which the law means when it holds a purchase of "commercial paper sacred, and even allows it to work "wrong against third persons. To warrant such a conse- "quence, the transaction must not only rest upon an actual "advance of money or its equivalent, but it must be strong "in its innocence and purity.'"

"And it was also held, that releasing the usury, and "taking a new note for the amount actually loaned, did not "make the contract one that would defeat the claim of the "true owner (see also *Ramsdell* v. *Morgan*, 16 Wend., 574).

"It is also urged, that even if the defendants are not to "be considered as *bona fide* holders or purchasers, still as "they took the stock from the pledgee, to whom the "plaintiffs were indebted at the time it was passed to the "defendants, that they were entitled to claim for the "amount so due.

"The answer to this objection is, that the debt for which "the stock was pledged to the plaintiffs *was not transferred* "*to the defendants with the stock*, but remained due to "other persons. A pledgee has no right to dispose of the "thing pledged separate from the debt, and if he, by dis- "posing of the pledge, incapacitates himself from return-

" ing the pledge on payment, the pledgor may sustain an " action therefor, even without a tender of the amount " advanced."

Felt v. *Heye*, 23 How. (N. Y.), 361 and 362.

" The following propositions may be considered as settled " principles of commercial law—principles which have " been, for the most part, reiterated by the Supreme Court " of the United States, and prevail throughout the Union.

" *First.*—That the purchaser or holder of a negotiable " instrument, who has taken it, (1), *bona fide;* (2), for a " valuable consideration; (3), in the ordinary course of " business; (4), when it was not overdue; (5), without " notice of its dishonor, and (6), without notice of facts " which impeach its validity as between antecedent parties " whose title was affected by those facts," gets a good title.

1 Daniel on Negotiable Instruments (2d Ed.), § 769, pp. 625-6.

" § 787. Thus a receiver appointed by a Court, and who " comes in possession of a bill or note of a litigant by op- " eration of law, acquires no better title than such litigant " possessed, for, as said in New York, ' he acquires title by " legal process, and not in the regular course of dealing in " commercial paper.' The like decision was rendered in " Connecticut, in respect to the receivers of assets of a " bank for the benefit of its creditors. So the assignment " of a bill or note by operation of a bankrupt or insolvent " law, is an instance out of the usual course of commercial " business. So also is a transfer by the payee or holder to " a trustee for the benefit of creditors. But under statute " in the State of Iowa, it has been held that an indorse- " ment of a note by the Sheriff, who had levied upon it, " had the same effect as if made by the holder himself.

"§ 781a. A bill or note in the hands of one not the payee, "and unindorsed, where it is not payable to the payee or "holder, would be open to defenses in the hands of the "transferee, for such possession and transfer are not in the "usual course of business. A bill in the hands of the "drawer, and payable to his order, might be properly ac- "quired from him, and the holder under his indorsement "would be protected against defenses, for the acceptor is "the primary debtor, and the drawer the original creditor."

Ibid., §§ 781, 781a, pp. 637-8-9.

In *Roberts* v. *Stall*, *37 Conn.*, *205*, A obtained a note from B by fraud, and transfered it to C, as trustee for certain creditors in part, and the balance for A's wife. The creditors accepted the transfer, and directed the trustee to bring suit. B had demanded the note back before the transfer, and pleaded fraud against the trustee. It was held *not a transfer in the usual course of business*, and the defence was allowed, Carpenter, *J.*, saying, "That commercial paper may be properly used as security for a pre-existing debt." The purpose for which the paper was used is exceptional and unusual. *We apprehend that cases like this are rarely to be met with in business circles.* Let us examine it more carefully. A man has a piece of negotiable paper with which he wishes to pay or secure certain debts. If there is but one debt he can transfer it directly to the creditor, and the law protects the transaction. This is according to the usual course of business. But if he transfers it to a friend to hold till due, and then collect it, and with its avails pay the creditor, that is unusual and suspicious upon its face, and requires explanation.

The defendant took and claims to hold Mr. Thompson's bonds under a contract condemned by the law; this could not be in the ordinary course of business. The negotiable quality in such securities is an exception grafted upon the

general law of property for the convenience of trade—lawful business—and is only available to promote that end. When the contract through which the title of the true owner is sought to be defeated is not of that character, the property has not, in fact, been negotiated, and the rights of the true owner are not affected by such transfer.

IV.—It was suggested by the Court of Appeals that the defendant might have made a specific loan to Capron & Merriam on Mr. Thompson's bonds, which might have been placed to their credit on the bank's books, and so have been lawfully used against certification. The answers to this are:

1st. It was not done, and courts deal with actual transactions, not hypotheses.

2d. It is an impossible suggestion. A court of justice cannot replace an unlawful contract by a suppositious one for the purpose of taking property from the true and innocent owner and giving it to the party claiming it through an unlawfal contract from the fraudulent bailee of the property.

3d. A certification of a check, without money to the credit of the drawer, is, in effect, a loan to the drawer of the check—a loan of the credit of the bank prohibited and condemned by the statute because of its insidious character. It is not a loan by previous agreement, nor for a definite time, nor for any return or profit to the bank. It does not appear upon the bank books as a loan, and cannot be traced or detected by the bank examiner. It is a loan made on the faith of an implied promise, by the drawer, that he will

cover the certifications by deposits before the close of banking hours on that day.

4th. Capron & Mirriam had overdrawn their account the day before by $27,000, the bank certified $236,000 against Mr. Thompson's bonds and other securities, the market value of which was $91,000—an actual loan on the bank books of $236,000—as against $91,000 of securities would not have looked well, and of course, was not made or thought of.

5th. A loan on the books of $236,000 to Capron & Merriam would have been a violation of the bank's charter, such loan exceeding 10 per cent. of its capital to a single person, incurred a forfeiture. This is another reason why such loan was not in fact made. If made it would have been unlawful.

The certifying of checks without funds is impossible of detection if the depositor make his checks good in time. Being less liable to detection than a specific loan, it was the course pursued by the bank, for which reason also it is expressly condemned by statute.

Lastly. A loan of over 10 per cent. of the bank's capital to Capron & Merriam being illegal, the bank would not have acquired Mr. Thompson's bonds in the ordinary course of business, and so could not hold them as against the true owner. This suppositious loan, therefore, does not help the defendant.

The ingenuity of the after-thought which remakes illegal contracts, and by reconstruction makes them legal, is an industry which should neither originate in, nor be fostered by, the courts. If penalties do not follow violations of law and courts become astute to give to illegal contracts the fruits of lawful contracts, a premium is immediately offered for violations of the law.

V.—The defendant cited below the following authorities relating to national banks:

N. B. of Xenia v. *Stewart*, 107 U. S., 676.
National Bank v. *Matthews*, 95 U. S., 621.
Gold Mining Co. v. *National Bank*, 96 U. S., 640.
National Bank v. *Whitney*, 103 U. S., 99.
Reynolds v. *National Bank*, 112 U. S., 405.
Fortier v. *New Orleans Bank*, *id.*, 439.

An examination of these cases will disclose—

1st. That the actions were between the parties to the original contract, or their privies.

2d. That the party receiving the consideration was, while retaining it, seeking to defeat the bank's recovery, under a penalty, or by the aid of the statute to set aside the contract and recover the collaterals pledged with the bank.

3d. In none of the cases were the rights of third parties involved.

4th. In none of the cases was § 5208 U. S. R. S. involved.

5th. In none of the cases was the contract condemned by the statute as "unlawful."

In the case at bar no question of forfeiture by the defendant is involved. The obligation of its contracts with Capron & Merriam is not involved.

The *statu quo* of parties in *pari dilicto* is not disturbed.

The party receiving the consideration is not availing him-

self of the statute as both sword and shield. No rescission of their contract is sought.

The simple question is: Did the transaction between Capron & Merriam and the defendant effect a forfeiture of Mr. Thompson's bonds to it? The coercive power of every principle of justice enforces a negative answer. An unlawful contract is not strong in purity and innocence. No case can be found, but this, which has given to an illegal contract the effective appointments and impregnable security with which the law surrounds transactions which have received the stamp of its approval.

The defendant cites the *Bank of Xenia* v *Stewart*, 107 U. S., 677, in support of the proposition that the defendant is a *bona fide* holder of value in the ordinary course of business. In that case the bank made a loan upon its shares; the administrator of the borrower brought suit to recover $1,200, the proceeds of the sale of the shares by the bank held.

"While this section (5201) in terms prohibits a banking "association from making a security upon the loan of its "own stock, it imposes no penalty, either upon the bank "or borrower (the penalty is for non-sale thereof within "six months), if a loan upon such security be made. If, "therefore, the prohibition can be urged against the validity "of the transaction by any one except the Government, it "can only be done before the contract is executed, *while the "security is still subsisting in the hands of the bank.* It "can then, if at all, be invoked to restrain or defeat the "enforcement of the security. When the contract has "been executed, the security sold, and the proceeds applied "to the payment of the debt, the courts will not interfere "with the matter. Both bank and borrower are in such "case equally the subjects of legal censure, and *they* will "be left by the courts where they have placed themselves."

The differences are—

1st. Section 5208 does impose a penalty for over certification and denounces it as unlawful.

2d. It does specify *as an exception* that "the checks so "certified shall be a *legal obligation of the bank.*

"3d. Mr. Thompson gave notice to the bank while the "security was still subsisting in the hands of the bank."

4th. Thompson was not the borrower, nor in *pari dilicto* with either bank or borrower.

5th. This is not an action to enforce the *penalty* of the statute ; it is brought to recover bonds concededly belonging to Mr Thompson ; the defendant justifies under an illegal contract.

6th. Neither the contract of certification nor its obligation is sought to be affected by this suit; the character of defendant's title to the collaterals is alone brought in question. Did it get the benefit of the negotiable quality of the bonds?

7th. Collaterals go with the principal debt; if that be void the title to the other fails.

"The promise to secure an illegal debt is void, and "the assignment which, by the terms of the agreement, "was specially made to secure the payment of the certifi-"cates is void also."

Tallmadge v. *Pell*, 7 N. Y,, 346.

This was an action to enforce a mortgage assigned as col-

lateral to certificates of deposit, given contrary to the banking laws of this State.

In a similar case the Court say: "The assignment "was executed as part of one and the same transaction. "Its object was to secure to one of the parties ultimate "payment for notes to be issued and put in circulation in "pursuance of the illegal contract. I see no principle "which could uphold the one when the other falls."

Dewitt v. *Brisbane*, 16 N. Y., 514.

Again: "The transaction amounted to this neither more "nor less: There was a contract, which, *though founded* "*upon a good consideration*, was forbidden by law, and "therefore void, and an assignment of property in trust to "secure the performance of the illegal promise—such a "trust cannot be supported."

Leavitt v. *Pulmer*, 3 N. Y., 19.

VI.—The prohibition against national banks loaning on the security of their stock (see U. S. R. S. § 5201), was enforced in

Bank v. *Lanier*, 11 Wal., 374.

In the above case the true owner of the stock, the collateral, was held entitled to recover the stock of the bank in spite of the unpaid loans by it on the faith of the stock.

Under Section 5201 the bank is prohibited from loaning on the security of the stock, and by Section 5208 it is equally prohibited from loaning by certifying checks without an equal amount of money on deposit.

S. P.—Conklin v. *National Bank*, 45 N. Y., 655.

VII.—The contracts with national banks which have been sustained by the United States Supreme Court have been between the parties, executed and simply *ulra vires.* not prohibited.

In *National Bank* v. *Matthews*, 98 U. S., 621-9, brought to enjoin the foreclosure of a deed of trust assigned to the bank as collateral security for a note, the Court say: "The "bank parted with its money in good faith. Its garments "are unspotted. Under these circumstances the defence "of *ultra vires*, if it can be made, does not address itself "favorably to the mind of the Chancellor. We find noth- "ing in the record touching the deed of trust which, in our "judgment, brings it within the letter or the meaning of "the prohibitions relied upon by the counsel for the de- "fendant in error." * * * Sedgwick(Stat. and Const. Amstr. 73) says, "Where it is a simple question of author- "ity to contract, arising either on a question of regularity "of organization or of power conferred by the charter, *a* "*party who has had the benefit of the agreement* cannot be "permitted in an action *founded upon it* to question its vali- "idity. It would be in the highest degree inequitable and "unjust to permit a defendant to repudiate a contract, *the* "*benefit of which he retains.*"

It will be observed about this case—

1st. That the Court decided that the deed of trust did not come within the letter or spirit of the prohibition.

2d. The plaintiff sought the interposition of a court of a equity, and was compelled to do equity; the same rule would have been applied to an agreement void for usury.

3d. The party seeking to enjoin the foreclosure had received the benefit thereof.

In the case at bar, Mr. Thompson was neither a party to nor a recipient of the benefit of the contracts of certification of Capron & Merriam's checks.

(*b*). The action is at common law; Mr. Thompson asked no equitable relief.

(*c*). The contract of certification was directly inhibited by the statute.

In the case of *Gold Mining Co.* and *National Bank*, 96 U. S., 641, the defence interposed was that the loans sued on were in excess of the chartered powers, being more than ten per cent. of its capital. The court say, "After *obtaining* " and *holding to* its *own use* the money, can the Mining " Company be allowed to interpose the plea that the bank " had no right to loan the money? * * * We do not " think that public policy requires or that Congress intended " that an excess of loans beyond the proportion specified " should enable the *borrower* to *avoid* the *payment of the* " *money actually received by him.*"

Here again the contract was simply *ultra vires.*

Mr. Thompson was not the borrower, nor does he seek to *avoid the payment of any money actually received by him.*

VIII.—Authorities on Illegal Contracts.

" A contract, made in violation of a statute, is void, and " it is immaterial that it is not so declared in the statute " itself. The law adjudges it to be so, and courts do not " undertake to pass upon the wisdom of the policy of the " Legislature in enacting prohibitory statutes."

Crocker v. *Whitney*, 71 N. Y., 170.

In an action on a check: defence, that it was given in contravention of the act in restraint of unauthorized banking.

"Giving full effect to this principle (that where a new "offence is created and a penalty affixed, the *punishment* "for the infraction of the law can only be in the mode de- "scribed), the civil rights and remedies arising out of the "inhibited acts are left untouched, and I apprehend it will "be found that, so far as these are concerned, there is no "distinction between an act *malum prohibitum* and *malum* "*in se*. Both are equally forbidden and unlawful; and I "will add, both are immoral, and cannot be the foundation "of a civil right that will be enforced in a court of justice. "14 Johns. R., 273. In *Thalhimer* v. *Brinkerhoff*, 20 "Johns. R., 397, Ch. J. Spencer says: 'It is a funda- "mental rule that all contracts which have for their object "anything repugnant to the general policy of the law, or "contrary to the provisions of a statute, are void; for it is "a rule, as well in law as in equity, *ex turpi contractu* "*actio non oritur*.' In the same case, Mr. Justice Wood- "worth says: 'An agreement expressly prohibited by "statute must necessarily be considered inoperative and "void. It will not be seriously urged that the party is "subject to the penalty only, and that the courts are bound "to consider the contract legal and valid.'"

Pennington v. *Townsend*, 7 Wend., 280, 281.

"This is a prohibitory statute, and every act done against "it is not only illegal but absolutely void."

"It would, in my judgment, be a dangerous doctrine and "subversion of all sound rules and principles, to listen to "a defence founded on a violation of this Act of Congress.

Hallett v. *Norion*, 14 J., 290.
S. P.—Thalimer v. *Brinkerhoff*, 20 J., 397.

"Courts are instituted to carry into effect the laws of a "country. How can they then become auxiliary to the "consummation of violations of law? * * * There "can be no civil right where there can be no legal remedy. "There can be no legal remedy for that which is itself "illegal."

Bank U. S. v. *Owens*, 2 Peters, 538.

"The contract, therefore, was expressly within the pro- "hibition of the statute, and the question is whether it is "not therefore void. The section is only prohibitory in its "terms. It does not declare, in so many words, that all "such contracts shall be void. But this is not necessary. "Every act done against a prohibitory statute is not only "illegal but absolutely void, and the Court cannot assist "an illegal transaction in any respect, or permit it to be "set up as a protection."

Hallett v. *Novian*, 14 John., 273, 290.

"In *Griffith* v. *Wells* (3 Denio, 226) the Court held that "though the Excise law did not in terms prohibit the sale "of strong or spirituous liquors without a license, nor de- "clare the act illegal, but only inflicted a penalty upon the "offender, yet that where a statute inflicts a penalty for "doing an act, though the act be not prohibited, the thing "is still unlawful; for it cannot be intended that a statute "would inflict a penalty for a lawful act. All such con- "tracts are void, though the statute does not declare them "so. It is sufficient that the statute forbids."

Story on Con., §§ 613, 614, &c.
Barton v. *Port Jackson and Union Falls Plank Road Company*, 17 Barbour, 404.

IX.—THE BURDEN OF PROOF is on the holder of ne-

gotiable paper negotiated in fraud of rights of the owner to show that he acquired it in good faith and for value.

Wilson v. *Rocke*, 58 N. Y., 642.
First Nat'l Bank v. *Green*, 45 N. Y., 301.
Nickerson v. *Ruger*, 76 N. Y., 282.

In any event, the defendant, having undertaken to prove the fact and failed, is bound by the evidence it offered as showing what the fact was.

X.—Defendant was not subrogated to the rights of Capron & Merriam.

Felt v. *Heye*, 23 How., 361.

The pledgee can only maintain a lien by retaining possession of the pledge and if he delivers up the pledge, he loses his lien.

Black v *Bogart*, 65 N. Y., 601.

A pledgee may assign the principal debt and deliver the pledge with it, but he cannot separate them.

Chapman v. *Brooks*, 31 N. Y., 75.

XI.—THIS APPEAL INVOLVES A FEDERAL QUESTION.

Every case, where the plaintiffs in error raised a federal question in the Court below, which was decided against him or was undecided, invokes the appellate jurisdiction of this Court, where a correct determination of such question necessitates a reversal of

the judgment. Questions affecting the construction of the National Banking Law have always been entertained without question.

Nat'l Bank v. *Matthews*, 98 U. S., 621.
Nat'l Bank v. *Whitney*, 103 U. S., 99.
Kaukana Co. v. *Green Bay Canal Co.*, 142 U. S., 269.

Conclusion.

The certifications being illegal, the bank did not receive the bonds in the ordinary course of business, which is necessary to cut off the equities of Mr. Thompson. The bonds were not negotiated and the title remained in Mr. Thompson. The judgment should be reversed and as the facts regarding the defence are stipulated to, plaintiffs should have judgment absolute.

LEWIS SANDERS,
Counsel for Plaintiff in Error.

SUPPLEMENT TO PLAINTIFF'S BRIEF.

THOMPSON *v.* ST. NICHOLAS NATIONAL BANK.

UNDER THE DOCTRINE OF APPROPRIATION OF PAYMENTS THE DEFENDANT IS NOT A HOLDER FOR VALUE OF PLAINTIFF'S BONDS.

It is stipulated "that the certifications made by the Bank were on the faith of the deposit of said bonds, and of such other securities as were held by the Bank for account of Capron & Merriam" (fol. 25).

The amount of the certifications was.....	$236,802 70
There was deposited the same day.....	211,263 81
Making a difference of.....	25,539 19

Against this balance the Bank held:

23 bonds Missouri, I and N, par.....	$23,000 00
5 " Peoria and Springfield.....	6,000 00
3 " N. T. Mont. and Boston.....	3,000 00
1,534 shares Hampshire and B. C. Co.....	15.340 00
50 " Pelham Trans.....	5,000 00
Total	$52,340 00

belonging to Capron & Merriam, which it appraised April 18, 1874, at $25,070 (folio 44).

The deposit of $211,263.51 was not credited either by them or the defendant to the payment of any particular items, as appears by defendant's evidence (fol. 38). "It "was a deposit to their general credit, and so credited by "the Bank, $211,263.51. Paid in by Capron & Merriam "to their general account, and so credited by the Bank." Being, therefore, left to the law to apply according to the justice and equity of the case, will it apply the deposit

exclusively to the payment of the certified checks to the relief of Mr. Thompson's securities, or will it apply it to the antecedent indebtedness of Capron & Merriam?

If the former, then the plaintiff was entitled to recover all or some of the bonds in suit, as appears by the following statement: Defendant made the following sales of the Jeffersonville, Madison and Indianapolis Railroad bonds:

September 12, 1874, 10 bonds,	$ 7,100
October 10, 1874, 10 bonds,	13,985
October 12, 1874, 13 bonds,	9,058 50
Total,	$30,143 50

or $4,604.31 more than the difference between the certified checks and the amount deposited April 18, 1874, which would leave 38 of the Jeffersonville, Madison and Indianapolis Railway bonds, 20 Indianapolis, Bloomington and Western Railroad bonds, belonging to Mr. Thompson, together with the $52,340 par value of the securities of Capron & Merriam, without any lien thereon for the certifications of April 18th, and the plaintiff's motion for the direction of a verdict for 25 of the Jeffersonville, M. and I. Bonds, and 20 of the I., B. and W. bonds, should have been granted (fol. 46, page 47).

As the Court should apply the deposit of April 18 to the relief of Mr. Thompson's diverted securities taken by the defendant under an illegal contract.

Trumbull *v.* Union Trust Co., 33 Ill. Ap., 319.
Brander *v.* Phillip, 16 Peters, 121.
Meyers *v.* U. S., 1 McLean, 493.

After notice on May 5th, 1874, of Mr. Thompson's ownership of the bonds in suit, the defendant was bound

to sell the securities belonging to Capron & Merriam first.

"We are of opinion that, after having received notice "of the plaintiffs' rights, and after having ascertained "that they had a fund belonging to Nims sufficient to "repay all their advances, and subject to a lien therefor, "without resorting to the proceeds of the plaintiffs' corn, "the defendants should be deemed to have held those "proceeds to the use of the plaintiffs, and that the pay-"ment of them to Hutchinson was in their own wrong."

Hazard v. *Fiske*, 83 N. Y., 298.

The bank was bound either to sell Capron & Merriam's securities in a reasonable time, on notice, and to notify Mr. Thompson, in compliance with his request, of the amount of its lien on the bonds, or to stand the loss on these securities occasioned by its delay in selling for five years.

It is no answer to say that Mr. Thompson might have filed his bill in equity to compel an accounting by defendant and an appropriation by defendant of the other securities first to the extinguishment of its lien.

The bank sold Mr. Thompson's bonds (38 M. J. and I.) without notice to him, and so asserted an absolute ownership thereof.

The antecedent indebtedness of Capron and Merriam to the bank did not make it a holder for value of Mr. Thompson's bonds, since the bonds were not received in payment nor in extension of such antecedent indebtedness.

"We are of opinion that a creditor, who takes a negotiable note before maturity, so endorsed that he becomes a party to the instrument as collateral security for a pre-existing debt, and in consideration of an extension of time to the debtor, actually granted is, according to the

2 146 U.S. 240

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Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 373.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of the Last Will and Testament of John B. Thompson, deceased,

Plaintiffs in Error,

vs.

THE ST. NICHOLAS NATIONAL BANK.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM ALLEN BUTLER,
JOHN A. TAYLOR,
Counsel for Defendant in Error.

C. G. BURGOYNE, Cor. Walker and Centre Streets, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1891.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of the Last Will and Testament of John B. Thompson, deceased, Plaintiffs in Error, vs. THE ST. NICHOLAS NATIONAL BANK.	No. 373.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

This cause comes before this Court on a writ of error to the Court of Appeals of the State of New York, to review a judgment of that Court affirming a judgment of the New York Supreme Court, First Judicial Department, entered upon the direction of a verdict for the defendant by the Judge before whom the case was tried at the Circuit.

See Judgment Record, fol. 65; *Writ of Error, fol.* 92.

The sole Federal question involved arises upon a claim of the plaintiffs in error of a right under Section

5208 of the Revised Statutes of the United States, the decision of the New York Court of Appeals having been against the right so claimed.

The action was Replevin in the *detinet*, to recover possession of ninety-three Railroad bonds of the alleged value of $150,000.

The COMPLAINT alleged the incorporation of defendant; the ownership by plaintiffs' testator, John B. Thompson, April 18th, 1874, of seventy-three bonds of the Jefferson, Madison and Indianapolis Railroad Company of $1,000 each, and twenty bonds of the Indianapolis, Bloomington and Western Railroad Company of $1,000 each; and that on or about the last-mentioned day defendant became wrongfully possessed of such bonds, which, on demand made, it refused to deliver to plaintiffs' testator. Judgment demanded for the return of the bonds or the value thereof, $150,000, and costs.

Complaint, fols. 9, 10.

THE ANSWER admitted defendant's incorporation; set up the general issue, and, as an affirmative defense, alleged that Capron & Merriam, bankers in New York, were, at the time mentioned in the complaint, customers of and depositors with the defendant, from which it procured loans and advances on the pledge of various securities for the repayment thereof, under an agreement that in case they should become indebted to defendant for moneys lent or paid for their account, in any sum, said defendant might sell any or all of said securities, at public auction or private sale and without notice, and apply the proceeds of sale to the payment of such indebtedness and the interest thereon; that the bonds specified in the complaint were so pledged by Capron & Merriam on account of such loans and advances, without knowledge on the part of the defendant of any interest therein of any other person; that

Capron & Merriam became largely indebted to defendant, and it proceeded under the agreement to sell said bonds, and, after crediting Capron & Merriam with the net proceeds, a large balance remained due.

Answer, fols. 11, 12.

At the trial, at the New York Circuit, before Mr. Justice PATTERSON and a jury, October 11th, 1887, the uncontradicted evidence showed the following facts:

1. That the ninety-three bonds claimed by plaintiffs were all coupon bonds payable to bearer (*Evidence of John B. Thompson, plaintiff's testator, p.* 6, *fol.* 14).

2. That plaintiff's testator delivered the ninety-three bonds in question to Capron & Merriam, his brokers, as margin for stocks purchased by them for his account (*Id., fol.* 15).

3. That Capron & Merriam pledged the bonds to the St. Nicholas National Bank, of which they were customers and with which they had large dealings, as collateral security for the repayment of any indebtedness which might at any time exist on their part to the bank. Such pledge was made under a written agreement, of which the following is a copy:

"AGREEMENT DATED THE 2D DAY OF DECEMBER, 1873.

"We hereby agree with the St. Nicholas National "Bank of New York, in the City of New York, that in "case we shall become, or be, at any time, indebted "to said bank for money lent or paid to us, or for our "account or use, or for any overdraft, in any sum or "amount then due and payable, the said bank may, in "its discretion, sell at the Brokers' Board, or at public "auction or private sale, without advertising the same, "and without notice to us, all, any and every collat- "eral securities, things in action and property held by "said bank for securing the payment of such debt, "and apply the proceeds to the payment of such in-

" debtedness, the interest thereon, and the expenses of " the sale, holding ourselves liable for the payment of " any deficiency that shall remain unpaid after such " application."

Agreement, fol. 26.

4. That after the pledge of the said ninety-three bonds, as aforesaid, the bank paid and advanced large sums of money on the faith of the said bonds and such other securities as were held by the bank for the account of Capron & Merriam.

5. That Capron & Merriam failed in business April 20th, 1874 (fols. 16, 31), owing the bank for checks certified and outstanding, and for money paid up to the close of business on April 18th, 1874, $71,920.17. On April 20th, 1874, before the bank heard of the failure, $210 was paid in addition, making a total debt of $72,136.17 (*fol.* 31), which remained unpaid.

6. That no notice or claim as to Thompson's ownership of the bonds in question came to the bank until May 5th, 1874 (*fol.* 18).

7. That the bank used its best efforts to procure as large a price as possible for all the securities pledged to it by Capron & Merriam, including the bonds in suit *(Stipulation by plaintiffs' attorney, fols.* 25, 26), and that, after crediting the entire proceeds of sale to Capron & Merriam, they failed to satisfy their debt to the bank, and a deficiency remained due of about $1,800 (*fol.* 32).

8. That no payment on account of the deficiency, and no tender or offer of any kind in respect to said bonds were ever made by plaintiffs' testator to the bank.

9. That this action was not commenced until April 18th, 1880 (*fol.* 8), six years after the bonds in question came into the possession of the defendant.

At the close of the trial, there being no disputed

questions of fact, both plaintiffs and defendant asked for a direction of a verdict in their favor respectively.

The plaintiffs stated, as a ground for their request for a direction of a verdict in their favor, "that the con-"tract of certification by the defendant was void as "being unlawful, being certification of checks of Capron "& Merriam when they had no money on deposit to "their credit with the defendant at the time of such "certification, and that the contract was unlawful and "the defendant cannot hold these securities as against "such unlawful certification, and on the further ground "that the bank did not take the securities in suit in the "ordinary course of business" (*fol.* 46).

In respect to certain questions of values the plaintiffs asked to go to the jury.

The Court directed a verdict for the defendant, to which direction the plaintiffs excepted (*fols.* 46, 47).

After a hearing on the plaintiffs' exceptions at the General Term, judgment was entered on the verdict in favor of defendant, March 29th, 1888, dismissing the complaint on the merits (*fols.* 52, 53), and on appeal the judgment of the General Term was affirmed by the Court of Appeals, April 27th, 1889; thereupon the judgment of the Court of Appeals was made the judgment of the Supreme Court, and final judgment entered May 2d, 1889 (*fol.* 69).

Plaintiffs sued out a writ of error to this Court (*fol.* 92).

POINTS.

First Point. The only Federal question arising in this case relates to the application and effect of Section 5208 of the United States Revised Statutes, one of the sections of the law regulating the National Banks. This question was fully considered by the State Courts, both on the hearing of the exceptions at the General Term and in the Court of Appeals, and was decided by both courts in accordance with the controlling adjudications of this Court as to the construction and effect of the National Banking law *(see Opinions of* DANIELS, J., *fols. 56-64, and* RUGER, Ch. J., *fols.* 71-85).

The judgment of the Court below should therefore be affirmed, on the principle announced in *Swope vs. Leffingwell*, 105 U. S., 3, where this Court say: "As the "only Federal question presented on the merits was "decided by the Court below in accordance with "our rulings in *National Bank vs. Mathews* (98 U. S., "621), and *National Bank vs. Whitney* (103 *Id.*, 99), "the motion to affirm is granted."

Second Point. It was established at the trial that the ninety-three bonds in question were coupon bonds payable to bearer, and were received by the defendant bank as collateral security against any advances to be made by it for account of Capron & Merriam, the brokers who pledged them as such security; also, that the bank had no knowledge or notice of any ownership or interest of any other person in respect to the bonds, and that they were sold, and the proceeds applied to pay the debt of Capron & Merriam, according to the terms of their pledge, and (as plaintiffs' stipulation, *fol.* 25, expressly admits) after the bank had used its best efforts to procure the largest price possible.

The title of the defendant bank to the ninety-three bonds in question as pledgees for value was indisputable. In the absence of bad faith on its part, a good title was acquired by the bank on the delivery of the bonds for advances made on the faith of the pledge.

Murray vs. Lardner, 2 Wall., 110.
Seybel vs. National Currency Bank, 54 N. Y., 288.
Birdsall vs. Russell, 29 N. Y., 220.
Dutchess Co. Mutual Ins. Co. vs. Hachfield, 73 N. Y., 226.
Evertson vs. National Bank of Newport, 66 N. Y., 14.

It was also established at the trial that no tender or offer of any kind was made by the plaintiffs' testator to the defendant bank, during the six years intervening between the pledge of the bonds and the commencement of this action.

The action was replevin in the *detinet*, to maintain which the plaintiff must show possession in himself or an existing right to immediate and actual possession of the property. This plaintiffs failed to show.

Bradley vs. Copley, 1 C. B., 685.
Hull vs. Carnley, 11 N. Y., 501.
Clements vs. Yturria, 81 N. Y., 285, p. 290.

Third Point. The sole exception appearing on the record which is available to the plaintiffs in error here is that taken at *fol.* 47, *p.* 28, to the direction of a verdict for the defendant. The plaintiffs must show error in that direction on some ground re-examinable in this Court (U. S. R. S., § 709).

The only ground stated by the plaintiffs in error to sustain this exception appears to be that the debt of Capron & Merriam, the pledgors of the ninety-three bonds in question to the defendant bank, arose out of

certifications of their checks made by the bank in excess of the amount of money they had on deposit at the time of such certifications, and that inasmuch as Section 5208 of the Revised Statutes makes such certifications unlawful, the bank was not a *bona fide* holder of the bonds.

This ground is untenable.

1st. The agreement of December 2d, 1873, between Capron & Merriam and the defendant was valid.

It was in no sense a violation of Section 5208 of the United States Revised Statutes, and the Court below properly so held.

The section of the National Banking Law invoked by the plaintiffs is as follows:

"SEC. 5208. It shall be unlawful for any officer, "clerk, or agent of any national banking asso- "ciation to certify any check drawn upon the "association unless the person or company drawing "the check has on deposit with the association at "the time such check is certified, an amount of "money equal to the amount specified in such "check. Any check so certified by duly author- "ized officers shall be a good and valid obligation "against the association; but the act of any officer, "clerk, or agent, of any association, in violation "of this section, shall subject such bank to the "liabilities and proceedings on the part of the "Comptroller as provided for in section fifty-two "hundred and thirty-four."

2d. The agreement of Capron & Merriam with the bank was as follows:

"AGREEMENT dated the 2d day of December, "1873.

"We hereby agree with the St. Nicholas Na- "tional Bank of New York, in the City of New "York, that in case we shall become, or be, at "at any time, indebted to said bank for money lent "or paid to us or for our account or use, or for "any overdraft, in any sum or amount then due

"and payable, the said bank may, in its discre-
"tion, sell at the brokers' board, or at public auc-
"tion or private sale, without advertising the
"same and without notice to us, all, any and every
"collateral securities, things in action and property
"held by said bank for securing the payment of such
"debt, and apply the proceeds to the payment of such
"indebtedness, the interest thereon, and the expenses
"of the sale, holding ourselves responsible and liable
"for the payment of any deficiency that shall remain
"unpaid after such application.

"CAPRON & MERRIAM."

3d. The agreement by its terms provided that in case of any indebtedness on the part of Capron & Merriam to the bank for money lent them, or paid for their account, or for any overdraft, the bank may resort at once and without notice to any securities pledged by them to the bank. It does not call for any act violative of the law. There was nothing illegal in providing that securities pledged by Capron & Merriam to the bank should be available to make good any indebtedness by them to the bank. The contention of the plaintiffs that the agreement was in contravention of the provisions of Section 5208, and therefore an illegal contract, is wholly without foundation. The cases cited by plaintiffs' counsel all relate to contracts which by their terms, or necessary implication, were unlawful and void.

See

Cent. Trans. Co. vs. Pullman Co., 139 U. S., 24.
Penn. Co. vs. St. Louis & A. R. R. Co., 118 U. S., 290.
De Witt vs. Brisbane, 16 N. Y., 508.
Leavitt vs. Palmer, 3 N. Y., 19.
Tracy vs. Talmage, 14 N. Y., 179.
Thomas vs. Railroad Co., 101 U. S., 71, *p.* 86.

As the section does not declare void a contract to secure a debt arising on the certifications pro-

hibited by its terms, the illegality of this contract cannot be maintained.

Royal British Bk. vs. Turquand, 6 Ellis & B., 325.
Commissrs. of Knox Co. vs. Aspinwall, 21 How. U. S., 539.
Stoney vs. Am. Life Ins. Co., 11 Paige, 635.
Bank of Ashland vs. Jones, 61 Ohio St., 145.

4th. There is nothing in the contract providing for certification of checks for Capron & Merriam. If there had been, inasmuch as the statute expressly provides that a check certified by a duly authorized officer of the bank where the customer has not on deposit at the time an amount of money equal to the amount specified in the certified check, shall nevertheless be a good and valid obligation against the association, there is nothing in the section which expressly, or by implication, prohibits the bank from taking security for the protection of its stockholders for the debt thus created. There is no prohibition whatever against a contract by the bank for security for a debt which the statute contemplates may come into being, although the unlawful act of the officer of the bank in certifying against the prohibition of the statute may aid in creating such debt. Wherever a contract is adjudged unlawful as against the prohibition of a statute, the prohibition must be found in the statute before the contract can be held to violate it.

Bridgewater & Utica Plank Road Co. vs. Robbins, 22 Barb., 662, *p.* 667.
Verona Cheese Co. vs. Murtaugh, 50 N. Y., 314.
Bonnell vs. Griswold, 80 N. Y., 128.
Benton vs. Wickwire, 54 N. Y., 226, *p.* 228.

5th. Section 5208 does not invalidate or prohibit a pledge of securities made to secure future advances,

and it has been held that a National bank may take personal security for future advances.

National Bank vs. Whitney, 103 U. S., 99, *reversing Crocker vs. Whitney*, 71 N. Y., 161, and *National Bank of Genesee vs. Bostwick, (Id).*

The fact that such advances were made by way of over-certification, possibly subjecting the bank, as between it and the Government, to the penalty prescribed for that violation of the section, does not operate to destroy the security of the debt created by the over-certification. If Thompson, the original owner, had made the pledge, he could not, after having had the bank's money, have got the bonds back by replevin; after giving Capron & Merriam the possession of the bonds and after the subsequent receipt of them by the bank, in good faith, neither Thompson nor his personal representatives could set up the section to destroy the debt.

A Receiver, if appointed, would have held the bonds as assets of the bank for its depositors and creditors.

6th. The Act of 1882 *(U. S. Statutes at Large, Volume 22, Laws 1882, Ch. 290, Sec. 13, p. 166)*, referred to on page 4 of the brief for plaintiffs in error, adds a further penalty for any willful violation of Section 5208, by declaring such violation by any officer, clerk or agent of any National banking association a misdemeanor, to be punished by fine and imprisonment. This supplementary statute, enacted long after the transaction in question in this cause, shows that the only penalties ever intended by Congress for over certification of checks were by way of forfeiture of the franchises of the bank and punishment of the delinquent officer or clerk and not by way of invalidating any commercial transaction connected with the

certifications, either as to the obligations of the bank or the liability of its customers.

Fourth Point. Even if the agreement of December 2d, 1873, contemplated certifications by the bank of checks of Capron & Merriam beyond the amount permitted by law, this does not affect the right of the defendant to the possession of the bonds in question, and to sell the same, as pledgees, in order to make good its liabilities on its outstanding certifications of those checks, which the law compelled it to pay. The penalty imposed by the statute is not a forfeiture of the debt of the drawer of the checks or of the securities held to protect the bank against its liabilities to third parties. On the contrary, it provides specifically that the act of any officer, clerk or agent of the bank in violation of Sec. 5208 "shall subject such bank to the "liabilities and proceedings on the part of the Con- "troller as provided for in Section 5234."

The liabilities and proceedings provided for in Section 5234 are the appointment of a Receiver and the winding up of the business of the bank.

The statute, being highly penal, cannot be enlarged by construction or implication, nor any penalty imposed except such as the plain language requires.

Whitaker vs. Masterton, 106 N. Y., 277, p. 280.

1st. There is no provision that the checks certified in violation of the prohibition of Section 5208 shall be void, or that the debt of the customer created by such certification shall be forfeited, or the customer released from liability. This being the case, as the bank was liable and bound to make good the checks to the holders, it follows that Capron & Merriam, for whom they were certified. remain bound to make good the amount to the bank. In the absence of any pro-

vision to the contrary, and in the presence of the plain provision of the section validating the checks, although improperly certified by the bank officer or clerk, the necessary result is that the bank on paying the checks was as much entitled to resort to the securities of Capron & Merriam in their hands as thay would have been to apply their money, if deposited, to meet the certified checks.

2d. It has been repeatedly held by this Court that where the provisions of the National Banking Statutes prohibit certain acts by banks, or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the Government, and cannot be availed of by private parties.

National Bank of Xenia vs. Stewart, 107 U. S., 676:

Section 5201, U. S. R. S., prohibits national banks from making loans or discounts on the security of their own capital stock. The Xenia National Bank made a loan in violation of this prohibition on a pledge of thirty shares of its capital stock, and in default of payment sold the security and credited the proceeds of sale on the loan. The administrator of the debtor brought an action for the conversion of the stock and had a verdict and judgment, the Court, at the trial, charging the jury that the bank was prohibited by Section 5201 from making the loan. On writ of error the judgment was reversed by the Supreme Court, which held that the prohibition could not be urged against the validity of the transaction by any one except the Government.

National Bank vs. Matthews, 98 U. S., 621. Loan in violation of prohibition of Sec. 5135, U. S. R. S. Held, that the sovereign power alone could object on the

ground of invalidity, and that "a private person cannot usurp the function of the Government."

See also:

Gold Mining Co. vs. National Bank, 96 U. S., 640.

National Bank vs. Whitney, 103 U. S., 99.

Reynolds vs. Crawfordsville National Bank, 112 U. S., 405.

Fortier vs. New Orleans Bank, *Id.*, 439, *p.* 451.

Logan County Bank vs. Townsend, 139 U. S., 67, p. 77.

3d. The case of *Bank vs. Lanier*, 11 Wall., 369, cited by plaintiffs in error, is not in conflict with the above decisions. It simply held that as between the bank and a holder for value of its stock, an attempt on the part of the bank to create a lien on the stock in its own favor and under its by-laws was illegal.

4. The general principle is well established that where acts otherwise lawful are prohibited by statute to corporations, private parties cannot avail of the prohibition to invalidate transactions which contravene the statute. The prohibition and prescribed penalty may render the corporation amenable to the State, but a private party cannot take advantage of them.

Atlantic State Bank vs. Savery, 82 N. Y., 291.

Jones vs. Guaranty and Indemnity Co., 101 U. S., 622, p. 629.

National Bank vs. Whitney, 103 U. S., 99.

5th. It would be a most violent and unjust construction of the section which would enable a paying teller of a National bank to ruin it on any business day by creating obligations by certifying customers' checks valid, as against the bank, and secured by actual antecedent deposit of securities by the customer, and yet void as to the application of the securities to the cus-

tomer's debt. Congress never intended any such consequence as the result of over certifications, but only to subject the bank violating the provisions of Sec. 5209 to the penalty of dissolution and receivership should the Government see fit to inflict it.

Fifth Point. The cases arising on the statutes against usury do not apply. In all these cases the thing done was against a positive prohibition of the statute against usury, and the bills or notes involved in the transaction were declared void by the terms of the statute. In the case at bar no such element exists. The debt due from Capron & Merriam to the bank for their over-drafts was not destroyed by the law, and while the act of certification by the bank's teller, in the absence of funds actually on deposit, might subject the bank to the risk of the penalty imposed for the certification, it nevertheless bound the bank by the very requirement of the law, and it was for this obligation that they had the right to resort to the securities pledged by Capron & Merriam.

Sixth Point. The claim that the defendant bank was not a holder for value, and did not receive the bonds in the ordinary course of business or in good faith, is based throughout on the assumption that there was some statutory prohibition operating to destroy the liability of Capron & Merriam to the bank for the amount of the debt created by the certification of their checks. It is contended, on behalf of the plaintiffs in error, that the bank paid no money, but only certified checks for the amount of which they became bound to the payees, but had no claim against Capron & Merriam *(See Brief of Plaintiffs in Error, pp. 8, 9).*

There is nothing to warrant this assumption. The bank was bound by its certifications, which were advances for the benefit of Capron & Merriman, just as much as if it had paid money to the like amount over the counter, and they created a present debt, for the repayment of which it was entitled to look to the securities pledged by the drawers of the checks. In the absence of a statutory forfeiture of this debt—and no such thing exists—it cannot be claimed that the debtors were absolved from its payment; and if they were not absolved, then the securities pledged by them for its payment were available to the bank.

Seventh Point. It is absolutely without question that the bonds in controversy came into the possession of the defendant bank *before the making of the certifications* of Capron & Merriam's check on April 18, 1874 *(Plaintiffs' stipulation, fol. 25)*. They were not pledged under any agreement or with any knowledge on the part of the bank or, in fact, of Capron & Merriam, that subsequent certifications would be called for or made; these were made after the pledge and created a debt of Capron & Merriam to the bank arising after the pledge. The agreement of December 2, 1873, then applied and became operative wholly independent of the act of certification.

The criticisms attempted in the brief of plaintiffs in error (*pp.* 14, 15) on a portion of the opinion of the Court of Appeals of New York are, we submit, wholly without basis.

The Court, after substantially deciding the case, stated in plain terms the effect of the transaction, and as an incidental and further view of the case showed that Capron & Merriam, the pledgors of the bonds, were bound to the bank as borrowers, independently of the act of certification by which the bank became bound

to the holders of the certified checks. To destroy the security on which the bank paid those checks would be to defeat justice by straining a penal statute beyond the reason of the law.

Eighth Point. Thompson, the original owner of the bonds in question, acquiesced for six years in the bank's possession of the bonds, and never made any demand for their return, except the alternative demand made in May, 1879, for their return or that the bank show what claim they had (*fol.* 20). He made no offer or tender. As the bonds were held in part for money paid out by the bank (*fol.* 31), he could not maintain replevin in the *detinet*. An action for conversion, or an equitable action for an accounting was open to him, but he could not maintain replevin.

Bakeman vs. Pooler, 637.
Taltz vs. Freedman's Co., 93 U. S., 325.

The delay of six years before suit brought is plain evidence that the claim had no such merits as to call for prompt action to assert them, and the plaintiffs' claim must be determined on the strict legal grounds applicable to the form of action their testator chose.

Ninth Point. The decision of this Court as to the effect of the restrictive provisions of the National Bank statutes in *Logan County National Bank vs. Townsend*, 139 U. S., 67, *cited supra p.* 14 *of this Brief*, seems to us controlling in this cause. It was made subsequent to the decision of the N. Y. Court of Appeals drawn in question here, and upholds the conclusion there reached.

The case was one in which a National Bank in Kentucky invoked the prohibition of the statute to invalidate its own contract. The Court of Appeals of

Kentucky decided adversely to the bank. This Court, in affirming the judgment reiterate the principle announced in *National Bank vs. Whitney*, 103 U. S., 99, that the "disregard by the bank of the provisions of "the Act of Congress only laid the institution open "to proceedings by the government for exercising "powers not conferred by law."

Tenth Point. The judgment of the Court below should be affirmed with costs.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1892.

No. 49.

JENNIE M. THOMPSON and JOHN C. THOMPSON, as Executors of the Last Will and Testament of John B. Thompson, deceased,
Plaintiffs in Error.

vs.

THE ST. NICHOLAS NATIONAL BANK.

Supplement to Brief for Defendant in Error.

The attention of the Court is respectfully called to the case of *Miller vs. Ammon*, 145 U. S., 421, decided at the last term of the Court, after the brief for the defendant in error in this cause had been filed.

In the case above cited, the Court declared the law applicable to a contract claimed to be in violation of a statute, and therefore void.

The facts involved were these:

The plaintiff in error, the defendant below, a citizen and resident of Wisconsin, purchased of a dealer in Chicago a quantity of wines at an agreed price, on a

credit, at the expiration of which the purchaser failed to pay the purchase price. The seller sued in the United States Circuit Court of Iowa to recover the purchase price. The defendant set up as a bar to the action a statute of Illinois empowering the City of Chicago to regulate and prohibit the selling of wines, and an ordinance of the City of Chicago, pursuant to the statute, prohibiting the selling of wines by any person without a special license. The record showed that the defendant did not have such a license.

The ordinance by its plain terms prohibited the contract which the action was brought to enforce, and the question was whether the plaintiff could recover for liquors sold in violation of its terms. This Court stated the general rule of law to be "that a contract made in violation of a statute is void, and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover," and then proceeded to consider certain cases in which exceptions to the rule are found, based upon the presumed legislative intent in enacting the prohibitory statute. The Court say: "In *Pangborn vs. Westlake* (36 Iowa, 546) it was thus stated how the exception should be determined: 'We are, therefore, brought to the true test, which is that, while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition, or to render the prohibited act void, the Courts will so hold, and construe the statute accordingly.' And in *Harris vs, Runnels* (12 How, 79) this Court, after noticing some fluctuations in the course of decision, and observing 'that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining

things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so,' added: 'It is true that a statute containing a prohibition and a penalty makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention of it. When the statute is silent and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.'"

The above-cited decisions were held by this Court to be authorities, in the light of which the contract in the case before the Court was held to be void, as coming within the rule and not within the exception to the rule. We submit that the application to the case at bar of the views of this Court as expressed in the opinion are conclusive against the contention of the plaintiffs in error that the contract drawn in question here was void, and that if the rule of law as to illegal contracts has any application whatever, which we deny, the case falls within the exception to the rule as stated and applied by this Court in *Harris vs. Runnels*, 12 How., 79, cited and approved in *Miller vs. Ammon*, 145 U. S., 421, p. 426.

Here all the conditions of the exception are fulfilled. While the officer, clerk or agent of a national bank is prohibited from over certification of a check, the check itself, so far from being declared void, is declared to be a good and valid obligation of the bank, and a specific penalty is imposed upon the bank for the violation of the provision against such over certification.

Therefore, if the contract of the bank with Thompson had been a direct engagement to certify his checks

against a deposit of bonds in lieu of a deposit of money, this would not have entitled him to reclaim the bonds on the ground of the invalidity of the contract, because the statute expressly makes the act of certification valid as respects the obligation created while subjecting the bank to the penalty prescribed for doing the act, and the statute does not by its terms inflict any other penalty or declare a forfeiture of any security held as collateral to the obligation arising on the certification.

While in an action based on an invalid contract the defendant may raise the question of invalidity as a bar to the action, the case is quite different where he seeks to recover money or property on the ground of such invalidity. The law leaves him in the position in which he has placed himself and will not aid his action.

The law will not aid either of two parties who are in *pari delicto* in the violation of a statute.

Harris vs. Runnels, 12 How., 79, *p.* 86.
Staples vs. Gould, 9 N. Y., 520.

But, as we have already claimed in the main brief, there was no contract here to do any act in violation of the statute, and the contention of the plaintiffs in error based upon the supposed invalidity of the contract wholly fails.

The counsel for the plaintiff in error in an addendum to his brief *(pp. 6a, 6b)* expressly concedes that the contract of December 2d, 1873, between Capron and Merriam and the bank was not illegal, but only "irrelevant."

He makes this concession in order to strengthen a claim that the case of *Bank vs. Lanier*, 11 Wall., 369, is an authority in his favor.

We have already referred to the Lanier case *(Brief for defendant in error, p. 14)* and will only add that its decision proceeded mainly upon the intent of the

National Banking Act in reference to its special provisions regarding the liability of shareholders. The act expressly prohibited the banks from lending money to their shareholders on the security of their shares.

It appeared that a *bona fide* purchaser of certain shares of stock in a national bank called on the bank to transfer the shares on the production of the stock certificates with a power of attorney to transfer them. The bank refused, on the ground that the stockholder had previously pledged the stock to it as security for a loan of money. Thereupon, the holder of the certificates sued the bank for damages for its refusal to transfer the stock. The bank pleaded the former pledge to it. The plaintiff demurred to the pleas on the ground that the pledge was illegal, and the demurrer was sustained. No question of title to the stock was involved, as the action was for damages and not for any specific property.

The case is thus wholly outside of the principles applied by this Court in the various cases where it has been held that violations of the National Banking Law, similar to that in the case at bar, while subjecting the bank to the penalty imposed, did not work a destruction or forfeiture of the debt or securities involved in the particular transaction, and it is in direct accord with the decision of this Court in the case of *Miller vs. Ammon*, 145 U. S., 421, above referred to, holding that the intent of the Legislature must be kept in view in determining the effect of a prohibitory law as to the validity or invalidity of transactions affected by it.

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UNITED STATES SUPREME COURT.

JENNIE M. THOMPSON ET AL.

vs.

THE ST. NICHOLAS NATIONAL BANK.

No. 49.

Memorandum on Behalf of Defendant in Error as to "Computation Submitted by Leave of Court" by the Plaintiff in Error.

The plaintiff in error in availing of the leave given to submit a computation as to application of payments, asserts that "where a Federal corporation is a party, every question is Federal," citing *Osborn vs. Bank*, 9 Wheaton, 823. That was the case of an appeal from the Circuit Court of the United States and has no application.

We submit that where a National Bank is sued in a State Court the judgment of the State Court is final, except as to the right of review upon a Federal question where the decision is adverse to a claim under the Constitution or Statutes of the United States. This is the necessary implication in the decision of this Court in *Logan County National Bank vs. Townsend*, 139 U. S., 67, where, on a writ of error to the Court of Appeals of

Kentucky, this Court sustained its own authority to re-examine the judgment only so far as the judgment determined that an exemption claimed by the bank under an Act of Congress did not exist *(see Opinion, pp. 72, 73)*.

This cause has been argued on behalf of the defenddant in error under the supposition that nothing is involved in this Court except the Federal question stated in the petition for the writ of error, and that this Court has no jurisdiction to entertain any other question. The point sought to be made as to application of payments was argued in the State Court, and is disposed of in the opinion of Chief-Justice RUGER.

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